Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

JOINT APPENDIX

Volume I

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Petition for Writ of Certiorari filed April 15, 1985
Certiorari Granted June 24, 1985

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May 28, 1985	Defendant Tom McGregor, as Trustee for Parsons Steel Industries, Inc., a Bankrupt, Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. _____

First Alabama Bank of Montgomery, N.A., and
Edward Herbert,

Plaintiffs,
v.

Parsons Steel, Inc., Jim D. Parsons, Melba L. Parsons,
and Parsons Steel Industries, Inc., and A. Pope Gordon,
as Trustee in Bankruptcy for Parsons Steel Industries, Inc.

Defendants.

This is an original action related to and arising out of
Parsons Steel, Inc., et al v.
First Alabama Bank of Montgomery, N.A.,
Civil Action No. CV-79-249-N.

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

Parties

1. Plaintiff First Alabama Bank of Montgomery, N.A. ("Bank") is a national banking association with its principal and only place of business located in Montgomery, Alabama. Plaintiff Edward Herbert ("Herbert") is a resident of Montgomery, Alabama.

2. Defendant Parsons Steel, Inc. ("Parsons-Mobile") is a corporation incorporated under the laws of the State of Alabama having its principal place of business in Mobile County, Alabama. Parsons-Montgomery is a wholly owned subsidiary of Parsons-Mobile. Defendant Jim D. Parsons and defendant Melba L. Parsons are individuals who reside in Mobile County, Alabama, and own 1 share and 98 shares respectively of the common capital stock of Parsons-Mobile of the 100 shares issued and outstanding. Defendant Parsons Steel

Industries, Inc., ("Parsons-Montgomery") is a corporation incorporated under the laws of the State of Alabama which had a principal place of business located in Montgomery County Alabama. Parsons-Montgomery does not do business because it was adjudged a bankrupt in *In re Parsons Steel Industries, Inc.*, Bankruptcy No. 79-173-N, United States District Court for the Middle District of Alabama. Defendant A. Pope Gordon has been appointed by the Bankruptcy Court in Bankruptcy Case No. 79-173-N as the Trustee for Parsons-Montgomery.

3. All of the above-described defendants are plaintiffs in *Parsons Steel Industries, Inc., et al v. First Alabama Bank of Montgomery, N.A., et al,* Civil Action No. CV-79-179-G, in the Circuit Court for Montgomery County, Alabama ("State Action"). Currently pending before the Circuit Court in that action are the motions for judgment n.o.v. and motions for new trial of Eank and Herbert.

4. Parsons-Mobile, Jim D. Parsons and Melba L. Parsons were plaintiffs in *Parsons Steel Inc., et al v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. CV-79-249-N, in the United States District Court for the Middle District of Alabama, Northern Division ("Federal Action").

Jurisdiction

5. This Court has jurisdiction because this action arises under 28 U.S.C. § 2283, which provides that this Court may grant an injunction to stay proceedings in a state court "where necessary in aid of its jurisdiction or to protect or effectuate its judgments," as hereinafter more fully appears. Federal courts have traditionally exercised jurisdiction under this statute to prevent relitigation in a state court of matters which have been or could have been litigated in a federal action which culminated in a prior judgment. *Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1981). The amount in controversy exceeds $10,000 exclusive of interest and costs.

Factual Allegations

6. On February 15, 1979, Parsons-Montgomery, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons filed their com-

plaint in the State Action against Bank and Herbert. This complaint generally avers fraud in connection with an alleged requirement by Bank that Parsons-Montgomery change its management and ownership as a condition for further financing and alleged violations of Alabama law in connection with the subsequent repossession and sale of the property of Parsons-Montgomery.

7. On May 30, 1979, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons filed their complaint in the Federal Action against Bank. This complaint avers that the above-described requirement of a change in management and ownership of Parsons-Montgomery as a condition for further financing violated 12 U.S.C. § 1972(1)(c), a provision of the federal Bank Holding Company Act.

8. The complaints in both the State Action and the Federal Action are virtually identical. Attached hereto as Exhibit "A" and incorporated by reference is a side-by-side comparison of substantive paragraphs contained in the state and federal complaints. This comparison graphically demonstrates that the complaint in the deral Action was in large measure copied word for word from the complaint in the State Action. Copies of these complaints in the State and Federal Actions are attached hereto as Exhibits "B" and "C" respectively and are hereby incorporated by reference.

9. In the Federal Action, this Court separated the issue of liability from other issues. After a jury verdict for plaintiffs, the Court granted Bank's motion for judgment n.o.v.; set aside the jury verdict; and rendered the order, judgment and opinion of June 17, 1981 ("Federal Judgment", a true and correct copy of which is attached hereto and made a part hereof as Exhibit "D"). The Federal Judgment dismissed the Federal Action on the merits. This Court noted the following:

> "It is significant that (1) there was a loan to Parsons Steel, but it was made by an officer of the bank for whose conduct plaintiffs make no complaint; (2) there was a change in management of Parsons Steel, but no loan was made in connection therewith or conditioned thereon; (3) there was a change of ownership of Parsons Steel, but it resulted

from foreclosure of a mortgage which, unfortunately, is a routine banking practice and which, apparently, Mr. Parsons agreed to (see his waiver of notice, etc.); and (4) there is no evidence that the facts asserted in this cause, under the circumstances of this case, constitute an unusual banking practice."

These findings and others by this Court in the opinion which accompanied Federal Judgment show that the material allegations of the complaints in both the Federal and State Actions are false.

The Eleventh Circuit affirmed Federal Judgment on June 25, 1982. 679 F.2d 242 (11th Cir. 1981), a copy of which is attached as Exhibit "E". The defendants who were plaintiffs in the Federal Action sought no further review.

10. Following the conclusion of the Federal Action, Bank and Herbert — in numerous state pretrial proceedings — repeatedly, and unsuccessfully, raised the ground that the Federal Action, which had been concluded on its merits, barred further prosecution of the State Action on principles of *res judicata* and collateral estoppel. The state court, on the contrary, required State Action to proceed through jury verdicts on February 9, 1983 and state judgments on them. Bank and Herbert have again asserted the bar of the judgment in Federal Action as ground for a state judgment n.o.v., currently pending in the state court. (A copy of the relevant portions of these motions for judgment n.o.v. are attached as Exhibit "F".)

Request for Injunctive Relief

11. The State Action is an attempt by defendants to relitigate matters which have been or could have been tried to conclusion in Federal Action. Such relitigation is barred by res judicata and collateral estoppel. This Court has jurisdiction under 28 U.S.C. § 2283 to enjoin further proceedings in the State Action because an injunction is necessary to protect or effectuate this Court's prior judgment in the Federal Action. All of the claims asserted in the State Action arise from a common nucleus of operative fact and should have been asserted in the Federal Action under this Court's power to hear pendent claims. The purpose of Con-

gress in the 1948 legislation which enacted 28 U.S.C. § 2283 in its present form was to permit federal courts to enjoin relitigation in state courts of matters finally adjudicated in federal courts. A federal court may enjoin state proceedings when principles of *res judicata* or collateral estoppel would bar such similar actions in a federal court. Defendants had a full opportunity to join their State Action claims with the claim for relief under the Bank Holding Company Act, 12 U.S.C. § 1972(1)(c); they failed to do so and sought to split their causes of action in state and federal courts, even though the doctrine of pendent jurisdiction and the broad joinder provision of the Federal Rules of Civil Procedure provided them with the vehicle for presenting to this Court in the Federal Action all of their several theories of relief. The injunctions sought in this action are essential to the preservation of the integrity of this Court's jurisdiction and the effectuation of its prior judgment — a judgment which has been upheld by the Eleventh Circuit Court of Appeals; and are essential as well to prevent irreparable injury to Bank and Herbert who have no other adequate remedy.

WHEREFORE, premises considered, Bank and Herbert pray for:

(a) A preliminary and permanent mandatory injunction requiring Parsons-Montgomery, A. Pope Gordon as Trustee for Parsons-Montgomery, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons, their agents, servants, employees, attorneys, and all persons in active concert or participation with them, to take whatever steps are necessary to dismiss the State Action.

(b) A preliminary and permanent injunction enjoining Parsons-Montgomery, A. Pope Gordon as Trustee for Parsons-Montgomery, Parsons-Mobile, Jim D. Parsons and Melba L. Parsons, their agents, servants, employees, attorneys, and all persons in active concert or participation with them, from attempting to enforce or execute upon any judgments entered on the jury verdicts returned in the State Action.

(c) A preliminary and permanent injunction staying further proceedings in the State Action.

(d) A preliminary and permanent injunction nullifying all Alabama state court orders in conflict with the order and judgment of this Court in the Federal Action.

(e) A preliminary and permanent injunction against the institution and prosecution of any other or different action in state or federal courts which seeks to relitigate there any matters which were or could have been litigated in Federal Action.

(f) Their costs and attorneys' fees incurred in the State Action and this cause.

(g) Such other, further or different relief as this Court may deem appropriate in the premises.

STEINER, CRUM & BAKER

BY M. R. Nachman, Jr.

BY James A. Byram, Jr.

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EXHIBIT A

COMPARISON OF CORRESPONDING PARAGRAPHS OF STATE AND FEDERAL COMPLAINT

State Complaint	Federal Complaint
12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employ-	12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr.

State Complaint	Federal Complaint
ment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."	Herbert advised and counselled with Subsidiary concerning the operation and management of Subsidiary.
14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."	13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.
13. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was	14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr.

State Complaint

employed to represent "Industries" to bring about a proposed composition of creditors. "Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00

Federal Complaint

Orange, was employed to represent Subsidiary to bring about a proposed composition of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

State Complaint	Federal Complaint
16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on the direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."	15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.
17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.	16. There was not significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.
18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed	17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary as "approximately

State Complaint

the assets of "Industries" at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and

Federal Complaint

$1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President and Chief Executive Officer of Subsidiary and that Mr.

State Complaint	Federal Complaint
Chief Executive Officer of "Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."	Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.
19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.	18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.
20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its	19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its

State Complaint

creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise.

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creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its posi-

State Complaint	Federal Complaint
The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.	tion of power, exercised total control over Subsidiary at this time.
22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information supplied to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.	20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary, was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

State Complaint

23. On a date in January of 1979, prior to January 9, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 9, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.

24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave notice that "Orange" would "cancel" his agreement with

Federal Complaint

21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 9, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated as $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additional time would be given to said company.

22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and, thus, resign as Chief Executive Officer.

State Complaint	Federal Complaint
"Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.	
25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.	23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date.
26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.	On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.
27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and	24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by

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delivered by "First Alabama" to "OSI" on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of "Industries."	Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,352.65 certain described personal property of Subsidiary.
28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."	25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.
29. The relationship between "Herbert" and "First Alabama" was, at all times pertinent hereto, that of agent and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institu-	26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and principal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that

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tion and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilites to their respective employers, the stockholders of both "First Alabama" and "Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

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of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operations of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

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30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Parsons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not of a sale to "OSI." This notice was given and received by the parties

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27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

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thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.	
31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "Industries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.	28. On or about the 2nd day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 5% just prior to the above takeover.

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32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defendant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange" acting individually and as an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.	29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.
36. Subsequently, "First Alabama," acting by and through "Herbert," took possession of the ongoing business operations of "Industries" as set out hereinabove, taking and selling all assets and properties of said corporation.	32. Subsequently, Defendant took possession of the ongoing business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation.

Excerpts From Relief Sought:

State	Federal
38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:	40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. § 1971, et seq., the Plaintiffs, separately and severally, suffered and sustained the following damages:
a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.	a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.
b. Plaintiffs "Industries" and "Steel" sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.	b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979).
c. Plaintiff "Industries" sustained the loss of all of its assets and properties taken and now claimed by "First Alabama" and/or "OSI" in the value of $2,419,945.89.	c. Plaintiff, Parent, has been greatly damaged in the
d. Plaintiff "Steel" sustained a severe loss due to the	

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serious decline in its own sales and collections due to the problems associated with the aforesaid takeover of "Industries" by defendants.

e. Plaintiff "Steel," as a result of defendants acts and actions,, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant "First Alabama" as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00 losing title to the real estate as described hereinabove.

f. Plaintiff "Parsons," has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff "Mrs. Parsons" has been caused great worry, stress, mental anguish,

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day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 11th day of January, 1979, her stock in Parent has greatly diminshed in value, all to her great damage and detriment.

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physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.	f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.
h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.	

EXHIBIT B

In The Circuit Court For Montgomery County, Alabama
No. CV-79-179-G
[Caption Omitted]

AMENDMENT TO COMPLAINT

COMES NOW Honorable A. Pope Gordon, Trustee in Bankruptcy for Parsons Steel Industries, Inc., Plaintiff in the above-styled action, and with leave of Court first had and obtained, hereby amends its Amended Complaint as follows:

1. By deleting the word "insolvent" from Paragraph 10 of Plaintiffs' Complaint as amended.

2. By deleting the following sentence from Paragraph 12 of Plainfiffs' Complaint as amended: "At no time prior to November 30, 1978, 'Industries' refused to pay or failed to pay any of its indebtedness to 'First Alabama'.

3. By deleting from Count II of Plaintiffs' Complaint, to add Count IX, to-wit:

COUNT IX

1. Plaintiff, Parsons Steel Industries, Inc., realleges Paragraphs 1-37 of its Amended Complaint.

2. Plaintiff, 'Industries', alleges that the disposition or sale of said Plaintiff's collateral on or about January 17, 1979, by Defendants 'First Alabama' and 'Herbert' to Defendants 'Orange' and 'OSI', hereinabove described, was conducted in a commercially unreasonably method and manner and that the time and terms of such disposition or sale was commercially unreasonable.

3. Plaintiff, Parsons Steel Industries, Inc., alleges further that reasonable notification of the time and place of said disposition or sale of said collateral was not given to said Plaintiff by Defendants 'First Alabama' or 'Herbert'.

4. Said Plaintiff alleges further that Defendants 'Orange' and 'OSI', as purchasers of the collateral hereinabove described, failed to act in good faith in the purchase of said collateral.

5. As a direct and proximate consequence of Defendants 'First Alabama', 'Herbert', 'Orange', and 'OSI', actions described hereinabove, Plaintiff, Parsons Steel Industries, Inc., suffered the loss of all of its assets in the amount of Two Million and Three Hundred and Eighty-four Thousand and Nine Hundred and Forty-five and 89/100 ($2,384,945.89) Dollars.

WHEREFORE: Plaintiff, Parsons Steel Industries, Inc. demands judgment against all Defendants in the sum of Two Million and Three Hundred and Eighty-four Thousand and Nine Hundred and Forty-five and 89/100 ($2,384,945.89) Dollars.

5. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count X, to-wit:

COUNT X

1. Plaintiff realleges Paragraphs 1-37.

2. Defendants 'Orange' and 'OSI' (by and through its predecessor in title, Standard Steel Building Systems, Inc.), on or about January 12, 1979, executed and delivered to Plaintiff, Parsons Steel Industries, Inc., a promissory note, a copy of which is attached hereto as Exhibit "A", whereby said Defendants promised to pay to Plaintiff on order or demand the sum of Twenty-three Thousand and no/100 ($23,000.00) Dollars with interest thereon at the rate of Eight Percent (8%) per annum and agreed to pay a reasonable attorney's fee for collection and waived exemption from execution.

3. Said Defendants owe to Plaintiff, Parsons Steel Industries, Inc., the sum of Twenty-three Thousand and no/100 ($23,000.00) Dollars which is due on said note, plus interest at Eight Percent (8%) per annum.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against said Defendants for the sum of

Twenty-three Thousand and no/100 ($23,000.00) Dollars, interest, attorney's fees and costs.

6. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count XI, to-wit:

COUNT XI

1. Plaintiff, 'Industries', alleges on information and belief that a life insurance policy with a cash value of approximately Eight Thousand and no/100 ($8,000.00) Dollars was purchased by Plaintiff, Parsons Steel Industries, Inc., on the life of Ed Hodge.

2. Plaintiff, Parsons Steel Industries, Inc., alleges that at the time Defendants 'Orange' and 'OSI' gained control of the premises of Parsons Steel Industries, Inc., said insurance policy remained on said premises and that said premises were under the direct supervision and control of Defendants 'Orange' and 'OSI'.

3. Plaintiff, Parsons Steel Industries, Inc., alleges on information and belief that Defendants 'Orange' and 'OSI' did wrongfully convert said life insurance policy and that value of same is rightfully the property of Plaintiff, Parsons Steel Industries, Inc.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against Defendants 'Orange' and 'OSI' for the value of said life insurance policy of the life of Ed Hodge.

JAMES JERRY WOOD

THOMAS R. DE BRAY

Attorneys for A. Pope Gordon

EXHIBIT B

In The Circuit Court Of Montgomery County, Alabama
No. CV-79-179-G
[Caption Omitted]

AMENDMENT TO COMPLAINT

Now come the Plaintiffs in the above styled cause and with leave of court, first had and obtained, hereby amend their Complaint heretofore filed in this cause as follows:

1. Plaintiffs amend Count One by striking therefrom in paragraph 27, the following "(two hours prior to the notice time)" in its entirety and by adding in lieu thereof the following: "(four hours prior to the notice time)".

2. Plaintiffs further amend Count One by striking therefrom paragraph "34" in its entirety and by adding the following paragraphs numbered "34, 35, 36, 37, and 38."

"34. All Plaintiffs, with the exception of 'Industries' were required by 'First Alabama,' to sign and execute personal agreements guaranteeing payment of the indebtedness of 'Industries' to 'First Alabama.' At said time, said plaintiffs were told by 'Herbert' that they would have to stand good for the corporate indebtedness on the part of 'Industries.'

"35. After 'First Alabama' called the loans of 'Industries,' as set out hereinabove, on or about the 11th day of January, 1979, Plaintiffs were forced by Herbert to transfer over to 'First Alabama' as payment on said indebtedness real property owned by 'Steel' and 'Industries' with a market value in excess of $950,000.00 in satisfaction of the debts. 'Herbert' told 'Parsons' that he ('Herbert') and 'First Alabama' considered the real property part of the Bank's collateral and that it had to be conveyed to the bank. 'Herbert' claimed that there would be no further liability if Plaintiffs complied with his demands. Due to the lack of time and the power and control held and exercised by the defendants 'Herbert,' 'First Alabama,' and 'Orange,' Plaintiffs were forced to comply with 'Herbert's' demands. At 'Herbert's' request, deeds, which were prepared by attorneys

selected and employed by 'Herbert' and 'Orange,' were executed by Plaintiffs, conveying the property supposedly in satisfaction of the debts.

"36. Subsequently, 'First Alabama,' acting by and through 'Herbert,' took possession of the on-going business operations of 'Industries' as set out hereinabove, taking and selling all assets and properties of said corporation.

"37. As a result of the scheme and plan set in operation by defendants 'Herbert' and 'Orange,' as described hereinabove, Plaintiff 'Industries' lost an on-going business, including all of its assets and properties of every kind and description, was effectively rendered insovlent and left with approximately $847,000.00 owed to unsecured creditors as of January 17, 1979.

"38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs 'Industries' and 'Steel' sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in tne future.

c. Plaintiff 'Industries' sustained the loss of all of its assets and properties taken and now claimed by 'First Alabama' and/or 'OSI' in the value of $2,419,945.89.

d. Plaintiff 'Steel' sustained a severe loss due to the serious decline in its own sales and collections due to the problems associated with the aforesaid take-over of 'Industries' by defendants.

e. Plaintiff 'Steel,' as a result of defendants' acts and actions,, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant 'First Alabama' as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00, losing title to the real estate as described hereinabove.

f. Plaintiff 'Parsons,' has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff 'Mrs. Parsons' has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.

h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand judgment against all Defendants in the sum of $10,000,000.00, interest, and costs."

3. Plaintiffs further amend their Complaint by striking therefrom Count Two in its entirety and by substituting in lieu thereof a new Count Two as follows:

COUNT TWO

"1. Plaintiffs re-allege paragraphs 1 through 37 of Count One of the Complaint as amended, as if set out here in full.

"2. Plaintiffs allege that Defendants acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do so as a result of their respective relationships with Plaintiffs.

"3. That after the takeover described above, 'OSI' has disposed of by sale or otherwise certain assets and properties of

'Industries' for prices in excess of the amounts allocated to given items in the inventory supplied to Attorney Kaufman and subsequently furnished to creditors, as aforesaid, but for less than the market value of said assets and properties.

"4. As a proximate consequence of the Defendants' actions described hereinabove, Plaintiffs, separately and severally, were caused to sustain the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs 'Industries' and 'Steel' sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.

c. Plaintiff 'Industries' sustained the loss of all of its assets and properties taken and now claimed by 'First Alabama' and/or 'OSI' in the value of $2,419,945.89.

d. Plaintiff 'Steel' sustained a severe loss due to the serious decline in its own sales and collections due to the problems associated with the aforesaid take-over of 'Industries' by Defendants.

e. Plaintiff 'Steel,' as a result of defendants' acts and actions,, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant 'First Alabama' as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00, losing title to the real estate as described hereinabove.

f. Plaintiff 'Parsons,' has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff 'Mrs. Parsons' has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.

h. Plaintiff 'Industries' was rendered insolvent by actions of defendants, acting in concert, as aforesaid, and lost its entire on-going business operations including, but not limited to, all assets and properties owned by it.

i. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand judgment against all Defendants in the sum of $10,000,000.00, interest, and costs."

4. Plaintiffs further amend their Complaint by adding thereto "Count Six, "Count Seven," and "Count Eight" as follows:

COUNT SIX

"1. On or about the 17th day of January, 1979, Defendants 'First Alabama' and 'Herbert' converted to their own use all personal property, including, but not limited to, the assets, accounts receivable, motor vehicles, and inventory of the Plaintiff 'Parsons Steel Industries, Inc.,' of the value of $2,419,945.89, the property of said Plaintiff.

"WHEREFORE, said Plaintiff demands judgment against Defendants 'First Alabama' and 'Herbert' in the sum of $2,419,945.89.

"Plaintiff further demands judgment against said defendants for punitive damages.

"Plaintiff further demands judgment against said defendants for interest and costs."

COUNT EIGHT

"1. Plaintiffs re-allege paragraphs 1 through 37 of Count One of the Complaint, as amended, as if set out here in full.

"2. Plaintiffs allege that Defendants acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do as a result of their respective relationships with Plaintiffs.

"3. Plaintiffs allege that Defendants, acting in concert, participated in a fraudulent conspiracy through a plan and scheme designed to accomplish the takeover of the going business of 'Industries' for 'Orange' through 'OSI' with very little investment and without assuming the liabilities to the creditors of said company, and that the taking of the assets and properties of said company amounted to a secret conversion thereof by said defendants to the detriment of all Plaintiffs and all creditors of 'Industries.'

"4. Plaintiffs reallege paragraph 4 of Count Two, including sub-paragraphs 4.a. through 4.i. of the Complaint as if set out here in full.

WHEREFORE, Plaintiffs demand judgment against all defendants in the sum of $10,000,000.00, interest and costs."

Jere L. Beasley
Attorney for Plaintiffs

Jere L. Beasley
Attorney at Law
P.O. Box 4537
Montgomery, Alabama 36101

EXHIBIT B

In The Circuit Court For Montgomery County, Alabama

No. CV-79-179-G

[Caption Omitted]

AMENDMENT TO COMPLAINT

COMES NOW Honorable A. Pope Gordon, Trustee in Bankruptcy for Parsons Steel Industries, Inc., Plaintiff in the above-styled action, and with leave of Court first had and obtained, hereby amends its Amended Complaint as follows:

1. Following Count VIII of the Amended Complaint, to add Count IX, to wit:

Count IX

1. Plaintiff, Parsons Steel Industries, Inc., realleges Paragraphs 1-37 of its Amended Complaint.

2. Plaintiff, Parsons Steel Industries, Inc., alleges that the disposition or sale of said Plaintiff's collateral on or about January 17, 1979, by Defendants "First Alabama" and "Herbert" to Defendants "Orange" and "OSI", hereinabove described, was conducted in a commercially unreasonably method and manner and that the time and terms of such disposition or sale was commercially unreasonable.

3. Plaintiff, Parsons Steel Industries, Inc., alleges further that reasonable notification of the time and place of said disposition or sale of said collateral was not given to said Plaintiff by Defendants "First Alabama" or "Herbert".

4. Said Plaintiff alleges further that Defendants "Orange" and "OSI", as purchasers of the collateral hereinabove described, failed to act in good faith in the purchase of said collateral.

5. As a direct and proximate consequence of Defendants' "First Alabama", "Herbert", "Orange", and "OSI", actions described hereinabove, Plaintiff, Parsons Steel Industries, Inc., suffered the loss of all of its assets in the amount of Two Million

Three Hundred Eighty-Four Thousand Nine Hundred Forty-Five Dollars ($2,384,945.00).

WHEREFORE: Plaintiff, Parsons St el Industries, Inc., demands judgment against all Defendants in the sum of Two Million Three Hundred Eighty-Four Thousand Nine Hundred Forty-Five and 89/100 Dollars ($2,384,945.89).

2. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count X, to wit:

Count X

1. Plaintiff realleges Paragraphs 1-37.

2. Defendants "Orange" and "OSI" (by and through its predecessor in title, Standard Steel Building Systems, Inc.), on or about January 12, 1979, executed and delivered to Plaintiff, Parsons Steel Industries, Inc., a promissory note, a copy of which is attached hereto as Exhibit "A", whereby said Defendants promised to pay to Plaintiff on order or demand the sum of Twenty-Three Thousand Dollars ($23,000.00) with interest thereon at the rate of 8% per annum and agreed to pay a reasonable attorney's fee for collection and waived exemption from execution.

3. Said Defendants owe to Plaintiff, Parsons Steel Industries, Inc., the sum of Twenty-Three Thousand Dollars ($23,000.00) which is due on said note, plus interest at 8% per annum.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against said Defendants for the sum of Twenty-Three Thousand Dollars ($23,000.00), interest, attorney's fees, and costs.

3. Plaintiff, Parsons Steel Industries, Inc., further amends its Complaint to add Count XI, to wit:

Count XI

1. Plaintiff, Parsons Steel Industries, Inc., alleges on information and belief that a life insurance policy with a cash value of approximately Eight Thousand Dollars ($8,000.00) was purchased by Plaintiff, Parsons Steel Industries, Inc., on the life of Ed Hodge.

2. Plaintiff, Parsons Steel Industries, Inc., alleges that at the time Defendants "Orange" and "OSI" gained control of the premises of Parsons Steel Industries, Inc., said insurance policy remained on said premises and that said premises were under the direct supervision and control of Defendants "Orange" and "OSI".

3. Plaintiff, Parsons Steel Industries, Inc., alleges on information and belief that Defendants "Orange" and "OSI" did wrongfully convert said life insurance policy and that value of same is rightfully the property of Plaintiff, Parsons Steel Industries, Inc.

WHEREFORE, Plaintiff, Parsons Steel Industries, Inc., demands judgment against Defendants "Orange" and "OSI" for the value of said life insurance policy of the life of Ed Hodge.

JAMES JERRY WOOD

THOMAS R. DE BRAY

Attorneys for A. Pope Gordon

OF COUNSEL:
Wood, Minor & Parnell, P.A.
P.O. Box 4189
Montgomery, AL 36101
832-4202

EXHIBIT B

In The Circuit Court For Montgomery County, Alabama
No. CV-79-179-G
[Caption Omitted]

SECOND AMENDMENT TO COMPLAINT BY DEFENDANTS PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS

Come now Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and pursuant to Rule 15, Alabama Rules of Civil Procedure, hereby amend their complaint heretofore filed in this cause as follows:

1. By adding to paragraph 12 of the complaint as amended the following:

> "At all times during 1978 First Alabama's loan officer, William M. Richardson, promised the continued financial support of Industries. Specifically in September, 1978, Richardson, on behalf of First Alabama, promised both to restructure the then-existing loans and to advance additional funds if Parsons would deposit an additional $100,000.00 of capital in Industries. In reliance on Richardson's promise on behalf of First Alabama, Parsons deposited $50,000.00 in Industries before being relieved of that requirement by Richardson and Bank. Plaintiff subsequently learned that Richardson had no intention of performing that promise and now denies even having made it."

2. By striking from paragraph 13 of the complaint as amended everything after the third sentence of that paragraph which ends, "for a good profit".

3. By striking from paragraph 14 of the complaint as amended the second sentence which begins, "Orange later indicated . . .".

4. By striking from the complaint as amended paragraph 15 in its entirety and substituting therefor the following:

"15. In connection with the negotiations for restructuring of the debt of Industries and the advancing of additional funds Herbert instructed Parsons to have a physical inventory of all assets of Industries performed as of November 30, 1978. Parsons employed Vilas V. Vawter and Associates, P.C., Certified Public Accountants, to assist in the inventory. The work was completed during the period November 27-28, 1978 and the information made available to the bookkeeper regularly employed by Industries. A balance sheet was prepared as of November 30, 1978 by the bookkeeper using the information supplied in the inventory and was transmitted to Herbert. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09."

5. By adding to paragraph 16 of the amended complaint at the beginning of that paragraph the following:

"On or about December 12, 1978 Parsons and his bookkeeper met with Herbert to discuss the ongoing negotiations concerning the financial future of Industries. In that meeting, Herbert informed Parsons that First Alabama would go no further in the negotiations and would call the loans unless Orange were made chief executive officer of Industries and made the principal owner of that corporation. Herbert specifically stated that additional loans would be made to Industries if that requirement were met. Herbert has subsequently admitted that he, on behalf of First Alabama, had no intention of making additional loans to Industries at that time and in fact denies even making that promise. Prior to entering into the written agreement to carry out Herbert's instructions Parsons was informed by Orange that he would seek additional loans from First Alabama if he were made chief executive officer and majority stockholder in Industries but stated he felt that additional loans might not be necessary because of a

plan he had devised to offer preferred stock to the creditors. Orange had subsequently admitted that he had no intention of seeking additional loans from First Alabama."

6. By joining as parties to Count IX of the Trustee's amended complaint to seek damages suffered by these Plaintiffs as a result of the sale as specified in ¶ 37.

7. By adding immediately following Count Six of the complaint and immediately preceding Count Eight of the complaint the following:

COUNT SEVEN

1. Plaintiffs reallege paragraphs one through thirty-seven of count one of the complaint as amended, as if set out here in full.

2. Under the circumstances as alleged herein, Defendant Orange owed a fiduciary duty to Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons separate and distinct from the fiduciary duty Orange owed to Industries.

3. Through his actions as alleged herein Orange breached that fiduciary duty and these Plaintiffs were damaged as a result as set out in paragraph 37 above.

WHEREFORE, Plaintiffs Parsons Steel Inc., Jim D. Parsons and Melba L. Parsons demand judgment against Defendant Mike Orange in the amount of $10,000,000.00.

8. By adding immediately following Count Eleven of the complaint as last amended:

COUNT TWELVE

1. Plaintiffs Parsons Steel Inc., Jim D. Parsons and Melba L. Parsons reallege paragraphs 1 through 37 of the complaint as amended as if set out here in full.

2. Without in any manner limiting their allegation that the actions of Defendants amounted to a fraudulent conspiracy through a plan and scheme designed to accomplish the takeover of Industries these Plaintiffs allege that Defendants made the following specific fraudulent statements:

a. First Alabama by and through its agent William M. Richardson acting at all times within his authority stated in September, 1978 that Bank would restructure the then existing debt of Industries and would advance additional funds if Parsons would deposit an additional $100,000.00 of capital into Industries.

b. On or about December 12, 1978, Herbert acting at all times as agent for First Alabama within the line and scope of his authority promised Plaintiff Jim D. Parsons that First Alabama would make additional loans and advance additional monies to Industries if Parsons would make Orange chief executive officer of Subsidiary and grant him a majority interest in Subsidiary.

c. On or about December 12, 1978, Orange stated to Plaintiff Jim D. Parsons that if his plan to offer the creditors preferred stock did not succeed, he would seek additional loans from First Alabama.

d. Both William M. Richardson and Herbert acting on behalf of First Alabama through words and actions as alleged herein led Parsons to believe that First Alabama would provide for the continuing financial needs of Industries.

3. The statements specified in paragraph 2 above were made by Defendants as a part of the conspiracy to defraud Plaintiffs and were made without the intention of performing them and specifically to induce action by these Plaintiffs.

4. These Plaintiffs relied on the statements and promises made by Defendants, acted to their detriment, and were damaged as a result as set out in paragraph 37 above.

WHEREFORE, Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons demand judgment against Defendants in the amount of $10,000,000.00.

Respectfully submitted,

BEASLEY AND WILSON

By: FRANK M. WILSON
Attorney for Parsons Steel, Inc.,
Jim D. Parsons and
Melba L. Parsons

Of Counsel:

Frank M. Wilson
Attorney at Law
P.O. Box 4537
Montgomery, Alabama 36101

EXHIBIT B

SUMMONS
IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

SUMMONS

To Any Sheriff or any person authorized by Rule 4 (a) (3) of the Alabama Rules of Civil Procedure to effect service in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon the defendants, namely,

First Alabama Bank of Montgomery, N.A., 8 Commerce Street, Montgomery, Alabama;
Edward Herbert, First Alabama Bank of Montgomery, N.A., 8 Commerce Street, Montgomery, Alabama;
OSI, Inc., Route 6, Box 23, 3110 Birmingham Highway, Montgomery, Alabama;
Michael Orange, Route 6, Box 23, 3110 Birmingham Highway, Montgomery, Alabama.

Each defendant is required to serve a copy of a written answer to the complaint upon

Jere L. Beasley

plaintiff's attorney, whose address is

P.O. Box 4537
Montgomery, Alabama 36101

within thirty (30) days after service of this summons excluding the day of service of the summons and to file the original of said written answer with the Clerk of this Court at the time of service of the answer upon the Attorney of Record for the Plaintiff or within a reasonable time thereafter. If any defendant fails to do

so, a judgment by default may be entered against that defendant for the relief claimed in the complaint.

Clerk of Court

Dated: February 15, 1979

COMPLAINT

COUNT ONE

1. Plaintiff Parsons Steel Industries, Inc., hereinafter referred to as "Industries," is a domestic corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Montgomery County, Alabama.

2. Plaintiff Parsons Steel, Inc., hereinafter referred to as "Steel," is a domestic corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Mobile County, Alabama.

3. Plaintiff Jim D. Parsons, hereinafter referred to as "Parsons," is a resident citizen of Montgomery County, Alabama. He served as President of "Industries" at all times pertinent hereto until the date of his forced resignation as described hereinbelow. He owns less than 5 percent of the capital stock of Parsons Steel, Inc., hereinabove described, and did so at all times pertinent hereto.

4. Plaintiff Melba L. Parsons, hereinafter referred to as "Mrs. Parsons," is a resident citizen of Montgomery County, Alabama. "Mrs. Parsons" owns over 95 percent of the capital stock of the said Parsons Steel, Inc., and did so at all times pertinent hereto.

5. Defendant First Alabama Bank of Montgomery, N.A., hereinafter referred to as "First Alabama," is a national banking corporation, with its principal place of business in the City of Montgomery, Montgomery County, Alabama.

6. Defendant Edward Herbert, hereinafter referred to as "Herbert," is a resident citizen of Montgomery County,

Alabama, and is employed as First Senior Vice President of "First Alabama" and was so employed at all times pertinent hereto.

7. Defendant OSI, Inc., hereinafter referred to as "OSI," is a domestic corporation organized under the laws of the State of Alabama, and was incorporated on or about January 11, 1979, with its principal place of business in Montgomery County, Alabama.

8. Defendant Michael Orange, hereinafter referred to as "Orange," a resident citizen of Montgomery County, Alabama, is believed to be the Chief Executive Officer and majority stockholder of "OSI," even though he was not listed as an original incorporator of said corporation.

9. a. At all times pertinent hereto, special relationship existed between "Industries" and "First Alabama," and between "Industries" and "Herbert," and between "Industries" and "Orange," all of which will be described hereinbelow.

b. Additionally, special relationships existed between "Orange" and "Parsons," between "Orange" and "Herbert," and between "Orange" and "First Alabama," all of which will be set out hereinbelow.

10. Plaintiff "Industries" was a going and solvent industrial concern doing business in the State of Alabama and other states, since its acquisition of a going-business on a date prior to January 1, 1976. For the years set out below, "Industries" had gross sales of: 1976 - $3,683,629.00; 1977 - $3,927,032.00; and 1978 - $3,591,839.00.

11. Plaintiff "Steel" is an industrial concern located in the City of Mobile, Alabama, which has done business throughout the Country, including Alabama, as well as internationally for several years. "Steel" owns the common stock of "Industries," but has no other legal control over the operation of "Industries," which operated under different management as a separate business. "Steel" owned and leased the real estate

upon which the business of "Industries" was physically located to said corporation at an annual rent.

12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."

13. On a date prior to November 30 in the year 1978, after the taking over the aforesaid loans, "Parsons" had a prospect interested in purchasing "Industries" (an out-of-state industrial concern which was attempting to purchase a location in the steel industry in a southern state). "Parsons" subsequently met with the prospective purchaser and so advised "Herbert." "Parsons," on behalf of "Industries," entered into negotiations contemplating the sale of the business and all assets for a good profit. "Herbert" subsequently advised "Parsons" that "Industries" should not be sold, but rather should continue to operate under the same management as before with no significant changes and that adequate financing would continue by "First Alabama" and that "First Alabama" preferred to deal with people they knew and trusted. "Parsons," at "Herbert's" request advised the prospect that there would be no further negotiations. At said time, the indebtedness from "Industries" to "First Alabama" was approximately $1,100,000.00.

14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."

15. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was employed to represent "Industries" to bring about a proposed composition of creditors. "Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawter and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00.

16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."

17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.

18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed the assets of Industries at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00. The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and Chief Executive Officer of "Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."

19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.

20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.

22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information supplied to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

23. On a date in January of 1979, prior to January 8, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 8, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.

24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave notice that "Orange" would "cancel" his agreement with "Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.

25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.

26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.

27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by "First Alabama" to "OSI" on January

17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.85 certain described personal property of "Industries."

28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."

29. The relationship between "Herbert" and "First Alabama" was, at all times pertinent hereto, that of agent and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilites to their respective employers, the stockholders of both "First Alabama" and "Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not

handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Parsons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not of a sale to "OSI." This notice was given and received by the parties thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.

31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "Industries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.

32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defendant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange" acting individually and as

an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.

33. Defendants failed to act in good faith in their dealings with Plaintiffs "Parsons" and "Industries" which resulted in the take-over by "OSI" of the business operations and assets of "Industries." The fraudulent acts of Defendants described hereinabove were committed with an actual intent to deceive and thus injure and damage Plaintiffs as well as the creditors of "Industries." Plaintiffs relied on the statements and actions of Defendants described hereinabove to their detriment.

34. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained severe damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.

c. Plaintiff "Industries" sustained the loss of all of its assets claimed by "First Alabama" and/or "OSI" in the amount of $2,384,945.89.

d. Plaintiff "Steel" sustained a severe loss due to a decline in the value of the capital stock of "Industries," and further sustained a serious decline in its own sales due to the problems associated with the aforesaid take-over of "Industries."

e. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

Wherefore, Plaintiffs demand judgment against all Defendants in the sum of $10,000.000.00 and costs.

COUNT TWO

1. Plaintiffs re-allege paragraphs 1 through 33 of Count One of the Complaint as if set out here in full.

2. Plaintiffs allege that Defendants separately and severally, acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do so. And, further that "OSI" has disposed of by sale or otherwise certain assets and properties of "Industries" for prices in excess of the amounts allocated to given items in the inventory supplied to Attorney Kaufman, as aforesaid.

3. As a proximate consequence of the Defendants' actions described hereinabove, Plaintiffs were caused to sustain the following damages:

a. Plaintiffs, individually and separately, sustained severe damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiffs sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.

c. Plaintiff "Industries" sustained the loss of all of its assets claimed by "First Alabama" and/or "OSI" in the amount of $2,384,945.89.

d. Plaintiff "Steel" sustained a severe loss due to a decline in the value of the capital stock of "Industries," and further sustained a serious decline in its own sales due to the problems associated with the aforesaid take-over of "Industries."

e. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

Wherefore, Plaintiffs demand judgment against all Defendants in the sum of $10,000.000.00 and costs.

COUNT THREE

1. Plaintiffs re-allege paragraphs 1 through 33 of Count One of the Complaint as if set out here in full.

2. Plaintiffs allege that Defendants separately and severally, acting in concert, failed to safeguard the interests of Plaintiffs in all transactions described hereinabove when they had a binding obligation to do so. And, further that "OSI" has disposed of by sale or otherwise certain assets and properties of "Industries" for prices in excess of the amounts allocated to given items in the inventory supplied to Attorney Kaufman, as aforesaid.

3. Plaintiffs request that Defendants be required to account for all profits made by said Defendants as a result of, or in connection with, the transactions described herein between Plaintiffs and Defendants or between Defendants and any third party or parties.

Wherefore, Plaintiffs request that a judgment be entered for Plaintiffs and against Defendants for the amount of all said profits made by said Defendants individually, collectively, or otherwise.

COUNT FOUR

1. On or about the 17th day of January, 1979, Defendants OSI, Inc. and Michael Orange converted to its own use all personal property, including, but not limited to, the assets, accounts receivable, motor vehicles, and inventory of the Plaintiff Parsons Steel Industries, Inc., of the value of $2,384,945.89, the property of said Plaintiff.

Wherefore, said Plaintiff demands judgment against Defendants OSI, Inc., and Michael Orange in the sum of $2,384,945.89, interest, and costs.

COUNT FIVE

1. The Plaintiff Parsons Steel Industries, Inc. claims possession from the Defendants OSI, Inc. and Michael Orange of the following described property: All personal property of Defendant Parsons Steel Industries, Inc. purported to be conveyed in that certain bill of sale from First Alabama Bank of Montgomery to OSI, Inc. dated January 17, 1979, as described therein.

2. Said Plaintiff also claims reasonable value for the hire or use thereof during its wrongful detention by the said Defendants from the 17th day of January, 1979.

Wherefore, the said Plaintiff demands judgment against Defendants OSI, Inc. and Michael Orange for the recovery of the property, or, in the alternative, the value thereof, and damages for detention in the sum of $2,384,945.89, interest, and costs.

Plaintiffs will amend their complaint, if necessary, after discovery is completed to more adequately describe the facts giving rise to their cause of action.

Jere L. Beasley
Attorney for Plaintiffs
P.O. Box 4537
Montgomery, Alabama 36101

Plaintiffs demand a jury for the trial of all issues in this cause.

Jere L. Beasley
Attorney for Plaintiffs

EXHIBIT C

In The United States District Court
For The Middle District Of Alabama
Northern Division
No. 79-249-N
[Caption Omitted]

AMENDMENT TO COMPLAINT

Now come the Plaintiffs in the above styled cause and, pursuant to Rule 15 of the Federal Rules of Civil Procedure, amend their compaint as follows:

1. Plaintiffs amend paragraph 8 by striking the original paragraph 8 in its entirety and by substituting in lieu thereof the following:

"8. During 1978, and for several years prior thereto, Defendant undertook to make loans and otherwise extend credit to Subsidiary for capital and operating purposes. The consideration for said extension of credit was pledging and assignment of all receivables, inventory, equipment, and other assets of Subsidiary to Defendant. In addition thereto, Defendant subsequently required Parent to sign a guaranty agreement up to $200,000.00 for said indebtedness, and further required an oral pledge of all real property owned by Parent in Montgomery County, Alabama (valued at approximately $1,030,000.00 by appraisal in Defendant's possession) and further, Defendant required as a condition and requirement for continuing to make loans and entend credit to the subsidiary that one Michael Orange (who was unknown to Plaintiffs) be brought in by subsidiary as the new Chief Executive Officer and that Jim D. Parsons resign as President (against his wishes) and that the said Michael Orange be given an option to purchase controlling interst in the capital stock of subsidiary."

2. Plaintiffs amend paragraph 34 by striking the original paragraph 34 in its entirety and by substituting in lieu thereof the following:

"34. The several additional requirements by Defendant as described herein as conditions to making the loans and extension of credit to Subsisiary are not additional credits, properties, or services which are related to and usually provided to a bank by a customer in connection with a loan, discount, deposit, or trust service, but were in fact additional credits, properties, or services to Defendant, other than those related to and usually provided in connection with a loan."

3. Plaintiffs amend paragraph 39 by striking the original paragraph 39 in its entirety and by substituting in lieu thereof the following:

"39. Plaintiffs were customers of Defendant for the purposes of the aforesaid Title 12, U.S.C.A. § 1971, et. seq. and specifically §§ 1972 and 1975."

"40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. § 1971, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979);

c. Plaintiff, Parent, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised

market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish; and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 17th day of January, 1979, her stock in Parent has greatly diminished in value, all to her great damage and detriment.

f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand judgment for treble damages, together with their costs of this suit, including a reasonable attorney's fee, and trial by jury of all issues so triable."

Jere L. Beasley
Attorney for Plaintiff

Jere L. Beasley
Attorney at Law
P.O. Box 4537
Montgomery, Alabama 36101

EXHIBIT C
United States District Court
For The
Middle District of Alabama
No. 79-249-N
[Caption Omitted]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Jere L. Beasley,

plaintiff's attorney, whose address is: P.O. Box 4537, Montgomery, AL 36101,

and answer to the complaint which is herewith served upon you within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Jane P. Gordon
Clerk of Court

Ann Rittenour
Deputy Clerk

Date: May 30, 1979

COMPLAINT

Plaintiffs, Parsons Steel, Inc., Jim D. Parsons, and Melba L. Parsons, sue Defendant, First Alabama Bank of Montgomery, N.A. and allege:

1. This action arises under the Banking Laws of the United States, Title 12, USC, Chapter 22, as hereinafter more fully appear. Jurisdiction is conferred on this Court by Title 12, USC Section 1975.

2. Plaintiff Parsons Steel, Inc. is a domestic corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Mobile County, Alabama.

3. Plaintiff Jim D. Parsons is a resident citizen of Mobile County, Alabama, at the present time. Said Plaintiff served as President of Subsidiary at all times pertinent hereto until the date of his forced resignation as described hereinbelow. He owns less than 5 percent of the capital stock of Parent and did so at all times pertinent hereto.

4. Plaintiff Melba L. Parsons is a resident citizen of Mobile County, Alabama. Said Plaintiff owns over 95 percent of the capital stock of the said Parent and did so at all times pertinent hereto.

5. Defendant, First Alabama Bank of Montgomery, N.A., is a National Banking Association organized and existing under the laws of the United States, and has its place of business in the City of Montgomery, Alabama.

6. At all times material hereto, Plaintiff Parsons Steel, Inc., hereinafter referred to as "Parent," was the owner and holder of all of the outstanding capital stock of Parsons Steel Industries, Inc., an Alabama corporation, hereinafter referred to as "Subsidiary."

7. At all times material hereto except as set forth below, Subsidiary was in the business of fabricating and selling steel building and steel products and had been so engaged for several years prior to January 17, 1979. As of January 1, 1979, the fair value of the capital stock of Subsidiary held by Parent was $1,850,000.00.

8. During 1978, and for several years prior thereto, Defendant undertook to make loans and otherwise extend credit to Subsidiary for capital and operating purposes. The consideration for said extension of credit was pledging and assignment of all receivables, inventory, equipment, and other assets of Subsidiary to Defendant. In addition thereto, Defendant subse-

quently required Parent to sign a guaranty agreement up to $200,000.00 for said indebtedness, and further required an oral pledge of all real property owned by Parent in Montgomery County, Alabama (valued at approximately $1,030,000.00 by appraisal in Defendant's possession) and further, Defendant required as a condition for making said loan that one Michael Orange (who was unknown to Plaintiffs) be brought in as the Chief Executive Officer of Subsidiary and be given an option to purchase controlling interest in Subsidiary. Because of the complexity of this case, more detail as to the facts thereof will be alleged herein.

9. At all times pertinent hereto, special relationships existed between Plaintiffs and Defendant, all of which will be described hereinbelow.

10. Subsidiary was a going and solvent industrial concern doing business in the State of Alabama and other states, since its acquisition of a going-business on a date prior to January 1, 1976. For the years set out below, Subsidiary had gross sales of: 1976 - $3,683,629.00; 1977 - $3,927,032.00; and 1978 - $3,591,839.00; and showed a net profit for each of said years.

11. Parent is an industrial concern located in the City of Mobile, Alabama, which has done business throughout the Country, including Alabama, as well as internationally for several years. Parent owns all of the capital stock of Subsidiary, but has no other legal control over the operation of Subsidiary, which operated under different management as a separate business. Parent owned and leased the real estate upon which the business of Subsidiary was physically located to said corporation at an annual rental.

12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did

Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr. Herbert advised and counselled with Subsidiary concerning the operation and management of Subsidiary.

13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.

14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr. Orange, was employed to represent Subsidiary to bring about a proposed composition of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawter and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as

of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.

16. There was no significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.

17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary, to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President

and Chief Executive Officer of Subsidiary and that Mr. Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.

18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.

19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its position of power, exercised total control over Subsidiary at this time.

20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary,

was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 8, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated at $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additional time would be given to said company.

22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and, thus, resign as Chief Executive Officer.

23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date. On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.

24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of Subsidiary.

25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.

26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and principal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operation of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the

properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

28. On or about the 8th day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 8% just prior to the above takeover.

29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.

30. Defendant failed to act in good faith in its dealings with Plaintiffs which resulted in the takeover by OSI, Inc. of the business operations and assets of Subsidiary and the subsequent insolvency of Subsidiary. The fraudulent acts of Defendants described hereinabove were committed with an actual intent to deceive and thus injure and damage Plaintiffs as well as the creditors of Subsidiary.

31. After Defendant called the loans of Subsidiary as set out hereinabove, on or about the 11th day of January, 1979, Parent was forced by Defendant to transfer over to Defendant as payment on said indebtedness all of the real property with an appraised market value of $1,030,000.00. Defendant indicated to

officers of Parent that it held a Mortgage on said property and considered the property part of Defendant's collateral, and that it had to be conveyed to the bank in lieu of foreclosure. Due to the lack of time and the power and control held and exercised by the Defendant, Plaintiffs were forced to comply with all of Defendant's demands. At Defendant's request, deeds, which were prepared by attorneys selected and employed by Defendant, were executed by Parent, conveying the property supposedly in satisfaction of the debts.

32. Subsequently, Defendant took possession of the on-going business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation, owned and managed by Mr. Michael Orange. As a result of the scheme and plan set in operation by Defendant and Michael Orange, as described hereinabove, Plaintiffs lost an on-going business, including all of its assets and properties of every kind and description. Subsidiary was effectively rendered insolvent and left with approximately $847,000.00 owed to unsecured creditors as of January 17, 1979.

33. In addition to the conditions placed on Plaintiffs by Defendant stated hereinabove, Plaintiffs Jim D. Parsons and Melba L. Parsons were forced to sign unlimited guarantees on the indebtedness of Subsidiary prior to the entry of Mr. Orange into the management of the business.

34. The several additional requirements by Defendant as described herein as conditions to making the loans and extension of credit to Subsidiary are not additonal credits, services, or securities, which are related to and usually provided to a bank by a customer in connection with a loan, discount, deposit, or trust service.

35. After Defendant demanded the said conditions and requirements on the part of Plaintiffs, Defendant, acting in concert with others, called all of the indebtedness as due and proceeded to foreclose on all of Subsidiary's assets, including the

receivables, inventory, equipment, and other business properties and proceeded further to sell same at a private sale to Mr. Orange's new corporation. (All taking place between January 8 and January 17, 1979.)

36. Defendant loaned $1,300,000.00 to OSI, Inc. (Mr. Orange) on January 12, 1979, to be used to purchase the assets and properties of Subsidiary and to acquire the real estate of Subsidiary and Parent. The only security or collateral given by OSI, Inc. to Defendant was the assets and properties of Subsidiary (which it did not own until the sale date, viz., January 17, 1979 - 5 days later) and its own capital stock (valued at $1,000.00). Mr. Orange was not required to make any personal guaranty of this loan.

37. By reason of the foregoing, Subsidiary has been place in involuntary bankruptcy and the capital stock thereof held by Parent has become worthless.

38. Under the provisions of Section 106(e) of the Bank Holding Company Act Amendments of 1970, 84 Stat. 1767, 12 USC Section 1975, Plaintiffs are entitled to recover from Defendant three times the amount of the damages sustained by them, and the costs of this suit, including a reasonable attorney's fee.

39. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:

a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.

b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of

no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979);

c. Plaintiff, Parent, has been greatly damaged in the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,030,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 17th day of January, 1979, her stock in Parent has greatly diminshed in value, all to her great damage and detriment.

f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.

WHEREFORE, Plaintiffs demand Judgment for treble damages, together with their costs of this suit, including a reasonable attorney's fee, and trial by jury of all issues so triable.

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EXHIBIT D

In The United States District Court
For The Middle District Of Alabama
Northern Division
No. 79-249-N
[Caption Omitted]

ORDER AND JUDGMENT

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the Defendant's motion to vacate and dismiss filed herein March 24, 1981, be, and the same is hereby, denied. It is further

ORDERED, ADJUDGED and DECREED by this Court that judgment notwithstanding the verdict be, and the same is hereby, entered in favor of Defendant; that the Plaintiffs take nothing by their complaint herein; and that the costs of this proceeding are hereby taxed against the Plaintiffs, for which execution may issue. It is further

ORDERED by this Court that Defendant's alternative motion for new trial filed herein March 24, 1981, be, and the same is hereby, denied as moot, and the above-styled cause is hereby dismissed.

DONE this 17th day of June, 1981.

R. E. Varner
United States District Judge

OPINION

This cause, having come on for trial before a jury and resulting in a verdict in favor of the Plaintiffs,[1] is now submitted to the Court on the Defendant's post-trial motions. The Plaintiffs sued the Defendant Bank, claiming a violation of that provision of the Bank Holding Company Act (hereinafter BHCA)

prohibiting any such bank from extending credit on the condition "that the customer provide some additional * * * property or service to the bank other than those related to and usually provided in connection with a loan" [12 U.S.C. § 1972 (1)(C)]. Jurisdiction of this Court is invoked pursuant to 12 U.S.C. § 1975. The Plaintiffs contend that the Defendant Bank, as a condition of an extension of credit (both a forebearance on an existing debt and a proposed additional loan which was not made) required the Plaintiffs to change the management of their business and to change to ownership of their business and that the requirement of the change of both constituted an unusual banking practice. The Bank, in defense, contends (1) that it never offered to extend further credit to the Plaintiffs at the time of the allegedly offensive conduct as it had already loaned the Plaintiffs to the extent of their credit; (2) that it made no requirement that Plaintiffs change management and ownership; (3) that even a change of management of ownership would not have been an unusual banking practice under the conditions in existence at pertinent times; (4) that the Bank's only interest was in maintaining a well-secured loan; (5) that no unusual banking practice occurred; (6) that there is no evidence of a "tie-in" within the meaning of the BHCA; and (7) that there is no evidence of any causal connection between the alleged BHCA violation and the alleged injury. These matters are raised by the Defendant Bank's motions for judgment notwithstanding the verdict and for new trial.

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[1] This Court, recognizing certain apparent weaknesses in the Plaintiffs' case as to liability and the necessary additional expenses of preparation for trial on the issue of damages, bifurcated the case, and the jury has not yet heard the evidence on the issue of damages.

The test of whether such motions should be granted is laid out in *Comfort Trane Air Conditioning v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979), citing *Boeing Co. v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) [en banc]:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the testimony - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury."

See, also, *Accord McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 758 (5th Cir. 1979); *Wansor v. George Hantscho Co.*, 570 F.2d 1202, 1207 (5th Cir. 1978).

Defendant Bank relies heavily on the recent ruling by the First Circuit Court of Appeals in *B. C. Recreational Industries v. First National Bank,* 639 F.2d 828 (1st Cir. 1981). The core issue in *Recreational Industries* was whether the plaintiff had stated a cause of action for a violation of 12 U.S.C. § 1972 by the bank. In *Recreational Industries,* the plaintiff alleged that the bank forced the plaintiff to hire a third party specified by the bank to manage the business. It was further alleged that this third party then insisted on increasing plaintiff's line of credit with its suppliers, thus increasing the debt owed the bank at high interest rates. This management policy, allegedly carried out in concert with and at the request of the bank, resulted in plaintiff's claim. That court, in ruling adversely to the plaintiff, noted that the legislative history of § 1972 reveals that it was aimed at preventing the use of a bank's economic power to lessen competition or engage in unfair competitive practices. Senate Report No. 1084, 91st Congress, 2nd Ses., reprinted in [1970], U.S. CODE,

Cong. & Ad. News, pp. 5519, 5535. The legislative history further provides that the statute is not intended to "interfere with the conduct of appropriate traditional banking practices." *Id.*; see, also, *McCoy v. Franklin Savings Assn. & Mortgage Management Co.*, 636 F.2d 172 (9th Cir. 1980); *Clark v. United Bank of Denver National Assn.*, 480 F.2d 235, 238 (10th Cir. 1973). Similarly, in *Sterling Coal v. United American Bank*, 470 F.Supp. 964, 965 (E.D. Tenn. 1979), the court noted that the BHCA "does not prohibit attempts by banks to protect their investments." The plaintiff in *Recreational Industries* argued that the forced hiring of a third-party manager was in violation of 12 U.S.C. § 1972 (1)(C). That court noted that, although the new management may have provided additional security in the form of management control, such did not come within the ambit of "additional credit, property or service". Therefore, the court concluded that the plaintiff failed to state a cause of action for violation of 12 U.S.C. § 1972. See, also, *Tose v. First Pennsylvania Bank*, Cases No. 80-2123 and 80-2334 (3rd Cir., 4/30/81).

The instant case, however, involves a claim that the Bank required a change of, not only management, but also controlling ownership to a person who was formerly a customer of the Defendant Bank. Plaintiffs and all witnesses in the instant case admit that a change of management, absent a requirement of a change of ownership, is not an unusual banking practice.

This case evolves from the processing of a series of loans by The First National Bank of Montgomery and its successor, The First Alabama Bank of Montgomery, with Parsons Steel of Montgomery, a corporation. Mrs. James Parsons owned 98 percent of the stock of Parsons Steel, and Mr. James Parsons (who considered his wife's stock his own) owned one percent of the stock of Parsons Steel. Mr. Parsons signed as surety of Parsons Steel on the notes involved, and Mrs. Parsons joined as surety on one of the notes. The loan officer originally handling the loan was a Mr. Richardson, who left the Bank in the fall of 1978, and the loan was thereafter assigned to a Mr. Herbert, a

vice president and officer of the Bank who contemplated either making another loan or renegotiating or collecting the existing indebtedness of Parsons Steel of Montgomery to the Bank in the fall of 1978.

Mr. Richardson testified that he had stated to Mr. Parsons prior to leaving the Bank that the Bank would extend no further credit to Parsons Steel of Montgomery because of then-existing problems with the loan. Mr. Richardson admitted having previously talked to Mr. Parsons about refinancing a $600,000.00 debt to the Bank if the problems could be cured. Mr. Herbert, the succeeding loan officer, testified that, after he reviewed the status of the business of Parsons Steel of Montgomery and discussed the matter with Mr. Parsons, he also concluded that no further money could be loaned to Parsons Steel.

During Mr. Richardson's tenure as loan officer, efforts were made to sell Parsons Steel of Montgomery to an organization referred to by witnesses as Ajax in the summer of 1978, and one of the reasons that the proposed sale to Ajax failed to materialize was that Ajax did not have sufficient credit to borrow sufficient money from the First Alabama Bank to buy the business (about one and one-half million dollars) and Mr. Parsons was unwilling to continue his assumption of any part of the obligations of the business upon transfer thereof. After the Ajax proposal failed to materialize, one or more of the Bank's officers suggested that a Mr. Orange of the City of Montgomery, Alabama, might be interested in purchasing the business. Upon their suggestion, Messrs. Parsons and Orange made contact and eventually agreed that Mr. Orange would assume the management of the business and would have an option for at least one year to purchase 55 percent of the stock of the business for a nominal sum.[2] Mr. Orange was, in addition to the stock option, to receive a salary of $10,000.00 for a year's work. Mr. Orange testified without contradiction that he made the proposal to Mr. Parsons that he would work for $55,000.00 a year and a stock option of ten percent of the stock or $10,000.00 a year and a stock option of 55 percent of the stock.

Mr. Orange further testified that the problem was that cash commensurate with paying a manager to operate the business allegedly worth over one million dollars was likely to be difficult for a business with very little cash flow, and he gave Mr. Parsons the option of deciding which way Mr. Orange would work. Mr. Orange testified further that there were several other proposals and that Mr. Parsons ultimately selected the option that Mr. Orange would receive $10,000.00 a year salary and an option to purchase 55 percent of the stock for $100.00. In December, 1978, Mr. Orange took over the management of the business and operated it until early January, 1979, when he resigned because he found the business in worse shape than Mr. Parsons had led him to believe. On January 8, 1979, Mr. Herbert, the loan officer at the Bank, reviewed the files and, finding Parsons Steel of Montgomery seriously in arrears, commenced foreclosure proceedings against Parsons Steel. On that date, Mr. Parsons went into the Bank and signed waivers in which he acknowledged full notice of foreclosure proceedings and waived other notice normally to be given him with full knowledge that Mr. Orange was to purchase the business for an amount sufficient to pay the Bank the full amount owed it. Mr. Parsons told Mr. Herbert that he was glad it was over and that he was through and was returning to Mobile to his other business.

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[2] This option was never exercised and has lapsed, but it seems to be the basis of the claim that the Bank required a change of ownership.

The transactions from which this cause of action arose commenced during the review of the loan and credit of Parsons Steel in November and December, 1978. During those months after Mr. Herbert took custody of the loan as loan officer (and no complaint is made that Mr. Richardson did anything wrong), Mr. Parsons apparently made some contact with Mr. Herbert and stated that he would in the future need some additional

loan. At that time, the Parsons' Mobile business and the Montgomery plant site were not encumbered to the Bank except to the extent of $200,00.00 and Mr. Parsons' home was not a part of the security for the indebtedness. These matters were discussed, and eventually the conversations evolved to the extent that Mr. Parsons sent in a financial statement as of November 30, 1978. In conversations, Mr. Herbert eventually learned that Mrs. Parsons owned 98 percent of the stock of Parsons Steel and that Parsons Steel was practicing various deceptive practices such as holding already written and executed checks for some days so that the check stubs would show payment of obligations whereas the Bank accounts would reflect the proceeds in the account and such as the listing of disputed claims as current assets receivable even though many of these claims were actually in litigation. There having previously been some discussion between Messrs. Herbert and Parsons in regard to the selling of the business by Mr. Parsons to Mr. Orange, Mr. Herbert told Mr. Parsons, among other things, that the Bank would not make any further loan unless Mr. Orange was taken in as manager of the business. The Plaintiffs alleged and sought to prove that Mr. Herbert also insisted that, in addition to hiring Mr. Orange as manager, a controlling amount of the stock of Parsons Steel be transferred to Mr. Orange. The only witness who testified to this was Mrs. Jean Wiggins, a bookkeeper for Parsons Steel of Montgomery, who testified that she was in Mr. Herbert's office with Mr. Parsons when Mr. Herbert told Mr. Parsons this. Mr. Herbert denied this, and Mr. Parsons, himself, did not clearly make any such statement.

Whether or not a proposal for change of ownership was made by Mr. Herbert, Mr. Parsons and Mr. Orange entered into an agreement prepared by a lawyer employed and paid by Mr. Parsons that Mr. Orange would work as manager of Parsons Steel of Montgomery for one year for $10,000.00 and an option to buy 55 percent of the stock for $100.00. No loan was involved directly in this transaction, though the Bank had not then instigated foreclosure proceedings. Mr. Parsons and Mr. Orange mutually participated in several plans to satisfy the demands of

the creditors of Parsons Steel. They sought to obtain an agreement for the composition of creditors, and they considered issuance of stock to their creditors and also considered bankruptcy. Yet, during all these maneuvers, additional Bank loans were not mentioned, and no loan application was mentioned.

Both Herbert and Parsons agree that the original contact between Orange and Parsons was Herbert's suggestion that Orange was interested in buying the business from Parsons and that the proposal evolved from the Bank's knowledge of the prior attempt by Mr. Parsons to sell the business to Ajax. Mr. Orange testified explicitly that he and Parsons worked out the arrangement for partial ownership and management of the business. Parsons' lawyers - Messrs. Waller and Kaufman[3] testified that, during the proceeding, they understood that both Orange and Parsons were negotiating for the best transaction that each could manage; that the negotiations appeared to be between Orange and Parsons; but that the Bank was interested in the final result. No further loan was made and there were no documents, loan application or note showing that any application for a loan was made after Mr. Richardson left the Bank as a loan officer. The only loans made by the Bank to Parsons Steel of Montgomery were negotiated apparently in good faith by Mr. Richardson and Mr. Parsons, and Mr. Parsons makes no complaint about those loans.

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[3] The testimony of the two attorneys who put together the Parsons-Orange transactions illustrates only that the Bank was interested in a normal creditor-debtor way - not that the Bank required a change of management and ownership of Parsons Steel.

Mr. Parsons' contention is that Mr. Herbert, as agent for the Bank, required Mr. Parsons to transfer the management and controlling ownership of Parsons Steel of Montgomery on agreement to transfer 55 percent of the ownership to Mr. Orange as a condition of a credit transaction relating thereto.

While Mr. Parsons admits that a requirement for a transfer of management is not an unusual banking practice as proscribed by the BHCA, he insists that a requirement that substantial ownership of said business be so transferred is an unusual banking practice and is proscribed by the BHCA.

Defendant insists that there is no evidence from which a reasonable jury could find that Mr. Herbert made any condition to an extension of credit, that there was any extension of credit and, if Mr. Herbert made a condition for the extension of credit, that the same was an unusual banking practice as proscribed by the BHCA.

THE LOAN

Mr. Parsons testified that Mr. Herbert never mentioned any specific sum of money to be loaned except when he, in discussing the need for a full financial statement from Mr. Parsons in November, 1978, stated that, "We need all this information. I don't want you borrowing a quarter of a million when you need $600,000." At that time, the Bank did not know the financial condition of Parsons Steel, and there was no occasion for a change in management or ownership. This Court is of the opinion that no reasonable person would conclude from that conversation that the Bank agreed to lend either figure. Mr. Parsons bases his contention upon the fact that Mr. Herbert implied that he would make such a loan by statements such as, "Let's get this information straight, we can work it out." According to Mr. Parsons, Mr. Herbert's (and, thereby, the Bank's) strongest proposal was made on December 12, 1978, that, "Unless you take Orange in on management, the Bank will go no further." Parsons' testimony conflicts with that of his bookkeeper, who testified that Mr. Herbert told Mr. Parsons that Mr. Herbert would make a loan if Mr. Orange was taken in for management and ownership of stock. She had no idea of the size or terms of the proposed loan.

The only paper mentioning a loan in the fall or winter of 1978 was a notation made by Mr. Richardson before Mr. Herbert

took over the account, "As of October 1, we will close a $600,000 loan secured by all property." Richardson testified this would be a consolidation of pre-existing debts. Mr. Parsons said that Mr. Herbert's proposal for additional loans between $250,000.00 and $600,000.00 involved a mortgage of all property of Mr. and Mrs. Parsons, including the property of the Mobile Company, the Parsons' home and the realty on which the Montgomery Company was located. Mr. Parsons admitted that part of this agreement was that he would keep an account of $100,000.00 in the Bank and that he never had over $50,000 in such an account. No such deposit and no such mortgage was ever made, and Mr. Parsons never testifed that he agreed to any such mortgage. Indeed, Mr. Parsons admitted that he was glad the final foreclosure was over. Mr. Parsons admitted in his testimony that, before January 8, 1979, he realized that the proposal for a composition of creditors was a mockery and that he told Mr. Herbert that he was through and was returning to Mobile. Thereafter, Mr. Parsons signed waivers agreeing to foreclosure of mortgages with knowledge that Mr. Orange would buy in at the mortgage sale. As a result of this foreclosure, Mr. Parsons was relieved of a personal obligation to the Bank of at least $176,000.00, his wife was relieved of a substantial personal obligation, and his Mobile business' premises were relieved of a mortgage for at least $200,000.00. There was no loan made to the Plaintiffs.

A study of the financial condition of the business in the months preceding the foreclosure in January, 1979, discloses little except to show that Mr. Parsons' recollection of the details was seriously discredited. Mr. Parsons testified that Parsons Steel did not need money in the months of August to November, 1978, but that, on December 12, 1978, when the management was transferred to Mr. Orange, who had "no knowledge of the steel business", the business fell apart before January 8, 1979. Yet, as early as January, 1978, Mr. Parsons showed a loss of $97,000.00 for the month. While this may not have been a representative month, no one denies Mr. Richard-

son's testimony that, before Mr. Herbert took over the loan, Mr. Richardson told Mr. Parsons that the Bank could not lend Parsons Steel any more money. At another time during his testimony, Mr. Parsons, himself, testified that in August, 1978, Parsons Steel had past due accounts payable but that they were not seriously in arrears - that they reached that point in September or October, 1978. When asked about the overdue account of Parsons Steel with U.S. Steel, Mr. Parsons said only that his relationship with U.S. Steel was more serious than with some other creditors. Mr. Parsons also admitted that a number of his notes to the Bank were in default. It was most obvious that the business did not simply fall apart during the month that it was managed by Mr. Orange. No loan was made during pertinent times.

THE REQUIREMENT

The strongest evidence that Mr. Herbert required a transfer of management and ownership as a condition of a loan came from Mrs. Wiggins, an accountant for Parsons. She testified that Mr. Herbert and Mr. Norris, officials of the Bank, conferred with her and Mr. Parsons in late November or early December, 1978. At that meeting, she testified that Mr. Herbert said he would need a financial statement to support further credit but that he saw no problem. She mentioned no specific loan and did not make clear whether the conversation pertained to proposed new advances or an extension of past due loans. She testified that, on or about December 12, 1978, when Mr. Herbert saw the November statement showing current liabilities in arrears, he was not pleased and said he would not make a further loan unless Mr. Orange was "taken in for management and in substantial stock". She admitted, however, that at that time the business was not current (though her prefiled affidavit shows that Parsons needed no loan in November and December, 1978, because of a satisfactory cash flow at that time), that there were substantial past due accounts payable, and that Parsons' bookkeeping system was indulging in deceit-

ful practices to inflate the book value of the business.[4] She also admitted that Mr. Herbert was not informed of this at the time she says he demanded a change of ownership. However, Mr. Parsons, himself, testified that Mr. Herbert, at that meeting on December 12, 1978, told him, "Unless you take Orange in on management, the Bank will go no further." Mr. Parsons' testimony did not coincide with Mrs. Wiggins' statement that Mr. Herbert, at the December 12, 1978, meeting, suggested that Mr. Orange have any part of the ownership of the business.

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[4] Parsons was holding checks for payment of past due accounts so that the checkbook would show the debts paid but the bank account would reflect the sum thereof as a current asset. Parsons was listing doubtful accounts receivable (even those in litigation) as current assets.

The witnesses all agreed that a requirement of a change in management as a condition of a loan is not an unusual banking practice. It is undenied that no change of ownership occurred (so the Bank did not require a change of ownership) prior to the time the mortgage was foreclosed. It is elementary that the foreclosure of a mortgage securing a past due debt is not an unusual banking practice. It follows that the Bank did not require a change of management and ownership as a condition of a loan to either Mr. or Mrs. Parsons or to both. This Court is, therefore, of the opinion that reasonable jurors indulging all inferences most favorably for the Plaintiffs could not conclude that Mr. Parsons was required by the Bank to transfer any ownership of his business.

In addition to Mrs. Wiggins' testimony, Mr. Parsons insists that certain circumstances establish that the Bank required a change of ownership, namely, that the Bank referred Mr. Orange to Mr. Parsons as a person interested in acquiring a new business and that Mr. Orange had, as a condition of acceptance of managerial duties, required an option to buy certain stock.

Even this was categorically denied as Mr. Orange testified that he required only a reasonable method of compensation for his management of a business valued at over one million dollars, that is, either $55,000.00 a year and an option for a nominal amount and reasonable time to buy ten percent of the stock or $10,000.00 a year and an option for a nominal amount to buy a controlling interest of 55 percent of the stock.[5] Mr. Orange testifed, and Mr. Parsons did not deny, that Mr. Parsons, not Mr. Orange or the Bank, selected the offer that Mr. Orange work for $10,000.00 annual salary and 55 percent of the stock. Parsons' theory for recovery seems to rise or fall upon an implication that somehow the Bank maneuvered Mr. Parsons into the situation that he could not refuse Orange's offer to manage the business for $10,000.00 and a controlling interest. However, Mr. Parsons admitted that he made no other attempt to get anyone else to manage the business, and he offered no evidence that he had any dissatisfaction with the arrangement he made with Orange. Only after Orange became manager of the business and (finding that the financial condition and credit of the business was worse than Orange had been led to believe by Parsons) had stated that he could not continue, did Parsons find any criticism of the business proposal make by Orange. Even then, Parsons and Orange discussed - and Parsons appeared to agree - that Parsons' best interest lay in a foreclosure by the Bank whereby Orange would pay off the Bank's loan on which Mr. Parsons was surety and on a part of which Mrs. Parsons was surety. Their interest was in avoiding personal liability. There was no requirement for change of ownership.

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[5] Mr. Orange testified of other offers whereby he would work for unusual salaries at $10,000.00 steps between $10,000.00 and $50,000.00 and have an option to buy a lesser amount of the stock as he received a larger annual salary.

THE CHANGE OF OWNERSHIP

The only effective change of ownership resulted from the foreclosure of the mortgage because Parsons wanted relief of his and his wife's suretyship liability and after Orange had pointed out Parsons' deceit in overstating the assets while selling Orange on the business. Parsons and Orange concluded that a foreclosure of the Bank's mortgage was best for both of them, and the Bank agreed. The Bank did not require Parsons to assign any ownership to Orange before the foreclosure. Parsons did not even own the stock to be transferred (his wife owned it), and it was never transferred. Even if the Bank participated in the talk of and option to change ownership, it was never changed, and the option to buy stock had lapsed because Orange had declined to exercise the option. The Bank always had the right to foreclose, and its foreclosure is not claimed to be an unusual banking practice.

At the time the Bank required (if it did) Parsons to convey ownership of the property, it was not making a loan or extending credit to Parsons but was going to extend credit to Orange's new corporation. Parsons does not have standing to sue for a practice related to a loan made to a third person.

UNUSUAL BANKING PRACTICE

Banking experts were not certain that a requirement of a change of management and ownership as a condition of a loan would necessarily be an unusual banking practice. Most had not seen both required as a condition of a loan. John McDonald, of a leading bank of Mobile, and all banking experts agreed that it would not be unusual if new management could not be obtained without new ownership. Robert Meyers, a banking consultant, had not seen both required but gave the opinion that it might be appropriate. Dr. Robert Dent, Plaintiffs' banking expert from the University of Georgia, testified that a requirement of a transfer of management as a condition of a loan is a usual banking practice but not if coupled with a requirement of a transfer of ownership. However, he said that, if a new manager could be

acquired only upon transfer of a stock option or if the business had a deficit net worth, then the situation would be changed. Mr. Louie Moore, a Montgomery banker, agreed. There was no substantial evidence from which a reasonable person could have concluded that a requirement for a change of management and ownership under the circumstances here involved was an unusual banking practice.

SUMMARY

It is significant that (1) there was a loan to Parsons Steel, but it was made by an officer of the Bank for whose conduct Plaintiffs make no complaint; (2) there was a change in management of Parsons Steel, but no loan was made in connection therewith or conditioned thereon; (3) there was a change in ownership of Parsons Steel, but it resulted from foreclosure of a mortgage which, unfortunately, is a routine banking practice and which, apparently, Mr. Parsons agreed to (see his waiver of notice, etc.); and (4) there is no evidence that the facts asserted in this cause, under the circumstances of this case, constitute an unusual banking practice.

The only evidence produced to support Plaintiffs' claim that the Defendant insisted on a change in management and ownership is the testimony of Parsons' bookkeeper, Mrs. Jean Wiggins, as to the essence of a conversation she and Mr. Parsons had with Mr. Herbert from the Defendant Bank. The Defendant insists that the isolated testimony of Mr. Parsons' bookkeeper was not sufficient to support a jury question, *Comfort Trane Air Conditioning v. Trane Co.*, supra, at 1383; *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976). The rulings in *Comfort Trane* and *Yoder Bros.*, were in reference to situations where the plaintiff's testimony was in direct conflict with documentary evidence. The *Trane* Court noted that the inference drawn from unsupported oral evidence cannot stand in the face of uncontradicted and substantial (written) evidence to the contrary. See, also, *Scott Medical Supply Co. v. Bedsole Surgical Supplies,* 488 F.2d 934,

937 (5th Cir. 1974). In the present case, the oral testimony of Mr. Parsons' bookkeeper conflicts with both the testimony of Mr. Parsons and the testimony of Mr. Herbert. Mr. Herbert's testimony is supported by the fact that documents usually associated with such transactions (loan applications and notes) are nonexistent. Those cases, therefore, are weighty authority for the Defendant.

Defendant also insists that the testimony on both the issue of an agreement to extend credit and the issue regarding a change of ownership consists of only the vaguest conversations about possibilities. The testimony of Mr. Parsons as to the loan of $250,000.00 to $600,000.00 was, indeed, vague, and no application for or note for such a loan was in evidence. Mr. Richardson testified that he talked to Mr. Parsons about a loan of $600,000.00 to consolidate pre-existing indebtedness, but this loan was to be secured by a mortgage on Mr. Parsons' house (and when Mr. Parsons declined to do this, they agreed that Parsons might refinance by payment on the debt of $100,000.00). The bookkeeper's testimony, that Mr. Herbert was not pleased with the November 30, 1978, financial statement and that Mr. Herbert told Mr. Parsons in her presence that the Bank would make no further loan unless Mr. Orange was taken in "for management and in substantial stock", was, indeed, general and vague in nature and was not even supported by Mr. Parsons as to the requirement of stock. In the light of the other evidence in this case and the failure of Mr. Parsons, himself, to testify that Mr. Herbert required the change of ownership, this Court is of the opinion that no reasonable man would conclude that Mr. Herbert ever submitted a requirement that Parsons deliver 55 percent of the stock or any other indicia of ownership to Orange.

This Court is of the opinion that, viewing the evidence in the light most favorable to the Plaintiffs, reasonable persons could not have found that the Plaintiffs proved by a preponderance of the evidence (1) that the Bank extended credit on any condition or requirement that either Plaintiff furnish some additional ser-

vice to the Bank other than those related to and usually provided in connection with a loan; or (2) than any transaction conditioned an extension of credit; or (3) that the Bank required a change of ownership of Parsons Steel; or (4) that a change of management and ownership was an unusual banking practice under the circumstances of this case.

The Defendant has also filed a motion to vacate and dismiss for absence of subject matter jurisdiction. This Court is of the opinion that, based on the pleadings, this Court has jurisdiction of the matters in controversy.

Defendant's final motion is, in the alternative, for a new trial. The burden on the moving party of such a motion being less severe than that for a judgment notwithstanding the verdict, this motion is moot.

A judgment notwithstanding the verdict will, therefore, enter in this case.

DONE this 17th day of June, 1981.

R. Varner
United States District Judge

EXHIBIT E

United States Court of Appeals,
Eleventh Circuit

June 25, 1982

Parsons Steel, Inc., et al.,
Plaintiffs-Appellants,

v.

First Alabama Bank of Montgomery, N.A.
Defendant-Appellee.

No. 81-7556

Frank M. Wilson, Beasley & Wilson, Jere L. Beasley, Montgomery, Ala., for plaintiffs-appellants.

M. R. Nachman, Jr., Steiner, Crum & Baker, Montgomery, Ala., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, MERRITT* and HENDERSON, Circuit Judges.

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*Honorable Gilbert S. Merritt, U.S. Circuit Court Judge for the Sixth Circuit, sitting by designation.

MERRITT, Circuit Judge:

The issue in this case is whether a bank is prohibited under the 1970 Amendments to the Bank Holding Company Act, 12 U.S.C. §§ 1972-75 (1976), from conditioning additional credit on a change of corporate management and majority stock ownership. Parsons Steel, Inc. of Montgomery was a wholly owned subsidiary of the plaintiff company, Parsons Steel, Inc.,

of Mobile, owned by co-plaintiffs Melba and Jim Parsons. The subsidiary had been heavily financed on an on-going basis since 1976 by the defendant First Alabama Bank of Montgomery. By the fall of 1978, the bank had outstanding fully secured loans of one million dollars and was the subsidiary's largest creditor.

At about this time the subsidiary began experiencing financial difficulty and anticipated inability to repay its debts. Mr. Parsons and an agent of the bank discussed refinancing the subsidiary's debt. The discussion between Parsons and the bank not only focused on refinancing but also included an unsuccessful attempt to sell the subsidiary to an out-of-town corporation. After the first attempt to sell fell through, the bank contacted a local businessman, Michael Orange, with whom the bank had done business, to determine if he were interested in buying the subsidiary. Although Orange declined to buy the company, he apparently offered to take over management of the company for a fee plus a stock option.

The plaintiffs claim that the bank conditioned the grant of any additionai credit on Parson's agreement to accept Orange as the manager of the subsidiary with an option to acquire a majority interest in the subsidiary in lieu of other compensation. The bank claims that it never agreed to extend any credit and did not require that Orange be granted the controlling stock option. The jury found that the bank did condition the extension of credit on the appointment of Orange as manager and on granting the option.

The District Court, although denying the defendant's motions for summary judgment and a directed verdict, heard all the evidence and ultimately granted the bank's motion for judgment notwithstanding verdict. The plaintiffs contend that in granting the judgment n.o.v., the District Court usurped the function of the jury and substituted its judgment of the credibility of the witness for that of the jury.

Taking the facts in the light most favorable to plaintiffs, we find, as a matter of law, that a bank's requirement that financial

control of an enterprise be placed in new hands when necessary to protect its investment before extending further credit, does not constitute a violation of the statute, 12 U.S.C. § 1972, absent evidence of a "tying" arrangement. We, therefore, affirm the judgment of the District Court.

Section 1972 of the Act provides in relevant part that "[a] bank shall not in any manner extend credit . . . on the condition . . . that the customer provide some additional credit, property, or service to such bank, *other than those related to and usually provided in connection with a loan, . . .*" 12 U.S.C. § 1972(1) (1976) (emphasis added). The appellants' arguments rest primarily on the single premise that a jury's finding that it is "unusual" for a bank to require a change in management and ownership as a condition to extending additional credit to an already heavily indebted enterprise in fear of default is sufficient to establish liability under the Act.

Although the language of the Act, when read in isolation, appears broad enough to encompass such a rule, the legislative history of the statute leaves no doubt that its intent is more narrow. The original focus of the Bank Holding Company Act was the regulation of the power of bank holding companies so as to prevent a small number of powerful banks from dominating commerce and to ensure a separation of economic power between banking and commerce. See Sen.Rep.No.91-1084, 91st Cong., 2nd Sess., reprinted in [1970] U.S. Code Cong. & Ad.News 5519, 5520; 116 Cong.Rec. 32127 (1970). With the 1970 Antitying Amendment, however, Congress intended to reach anticompetitive practices of even smaller banks, which notwithstanding their comparative size, were able to exert economic power over businesses because of their control over credit. *Id.* at 5535. In regulating potential misuse of such economic power, however, Congress was concerned that the federal regulation not be too expansive. First, Congress did not intend to "interfere with the conduct of appropriate traditional banking practices," *id,* and did not intend to prohibit attempts by banks to protect their investments where no anticompetitive

practices were involved. A *per se* rule prohibiting banks from devising particular methods for protecting themselves against default in various situations could have the undesirable effect of discouraging banks from granting extensions of credit, and thus precipitate foreclosure or bankruptcy. There is no support for such a rule in the legislative history. Indeed, an earlier proposed version of the antitying provision which would have potentially subjected virtually all conditions placed by banks on extensions of credit requiring credit customers to purchase additional services from the bank to review by the Federal Reserve Board, was amended to incorporate the narrower language of the statute which explicitly permits banks to take certain actions to protect their investments while prohibiting anticompetitive practices. *See* Remarks of Senator Bennett, 116 Cong.Rec. 32125 (1970). Second, it appears that Congress was concerned that the proposed federal banking regulation not intrude upon recognized state authority over the banking process. In proposing the version of § 1972 that was ultimately enacted Senator Bennett noted that "[t]o provide federal bank regulatory restrictions on state banking practices without reference to antitrust considerations would be a reversal of a long-standing policy under which State law regulates State banking practices . . ." 116 Cong.Rec. at 32130-31. It appears, therefore, that the purpose and effect of § 1972 is to apply the general principles of the Sherman Antitrust Act prohibiting anticompetitive tying arrangements specifically to the field of commercial banking, without requiring plaintiffs to establish the economic power of a bank and specific anticompetitive effects of tying arrangements:

> [T]ying arrangements involving a bank are made unlawful by this section without any showing of specific adverse effects on competition or other restraints of trade and without any showing of some degree of bank dominance or control over the tying product or service. Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved.

Sen.Rep.No.91-1084, 91st Cong., 2nd Sess. [1970], U.S.Code Cong. & Admin.News 5519, 5558 (Supplementary Views of Edward W. Brooke).

Given the specific purposes for which the statute was enacted, it is not sufficient in order to establish a violation of the Act to show simply that a particular method of protecting against default is not commonly used. Unless the "unusual" banking practice is shown to be an anticompetitive tying arrangement which benefits the bank, it does not fall within the scope of the Act's prohibitions.

Our decision here is consistent with the former Fifth Circuit's interpretation of § 1972 in *Swerdloff v. Miami National Bank,* 584 F.2d 54 (5th Cir. 1978). In *Swerdloff* the bank allegedly required the owners of an indebted corporation to sell 51% of the company stock to a competitor, also a customer of the Bank. The issue there was whether the fact that a bank required a sale of a business to a third party where no benefit to the bank was alleged, constituted a 'tying arrangement' under the Act. The Court held that where a bank is alleged to have imposed a requirement that the business be sold as a condition of granting further credit, benefit to the bank may be assumed for the purposes of a motion on the pleadings. In the instant case, the District Court, consistent with *Swerdloff,* refused to dismiss the case on the pleadings and in fact denied the Bank's motion for summary judgment and directed verdict. The District Court allowed the plaintiffs the opportunity to establish the existence of a prohibited tying arrangement. The plaintiffs were able to establish only that the requirement allegedly imposed upon them was an unusual banking practice. But to establish a violation of § 1972, the "unusual banking practice" must be shown to be a tying arrangement. The plaintiffs must prove the existence of "anti-competitive practices which require bank customers to accept . . . some other service or product . . . in order to obtain the bank product or service they desire." [1970] U.S.Code Cong. & Ad.News at 5535.

The plaintiffs have here failed to establish facts from which the existence of a tying arrangement benefitting the bank could reasonably be inferred. The bank did not tie the loan to any other bank product, service or benefit, and thus there is no "tied" product or service. The subsidiary was in financial difficulty and the bank was simply reluctant to grant additional credit. Parsons was in the market for a purchaser of the subsidiary he controlled. The fact that Mr. Orange had been a customer of the bank and that his name was suggested by the bank does not establish a "tie-in." There is no evidence that the bank would benefit in any way other than by getting additional protection for its investment. That is not a tying arrangement. The allegation that the bank wanted to induce Mr. Orange to do additional business by offering him a favorable deal has no factual support. The District Court's grant of a judgment notwithstanding verdict was thus justified.

Other Circuits that have interpreted the amended Act are in accord with the view that § 1972 is intended to prohibit anticompetitive tying arrangements, and that other uses of a bank's economic power to protect its investments are not affected by the Act. *Tose v. First Pennsylvania Bank,* 648 F.2d 879 (3rd Cir.), *cert. denied,* ____ U.S. ____. 102 S.Ct. 390, 70 L.Ed.2d 208 (1981) (bank's imposition of financial controls in order to protect its investment, even when a change in ownership is necessary, not a violation of the Act); *B.C. Recreational Industries v. First Nat'l Bank of Boston,* 639 F.2d 828 (1st Cir. 1981) (requirement that borrower in danger of default hire a specified general manager not a tying arrangement prohibited by the Act); *see also, McCoy v. Franklin Savings Ass'n,* 636 F.2d 172 (7th Cir. 1980); *Duryea v. Third Northwestern Nat'l Bank,* 606 F.2d 823 (8th Cir. 1979); *Costner v. Blount Nat'l Bank,* 578 F.2d 1192 (6th Cir. 1978); *Clark v. United Bank of Denver,* 480 F.2d 235 (10th Cir.), *cert. denied,* 414 U.S. 1004, 94 S.Ct. 360, 38 L.Ed.2d 240 (1973).

The subsidiary was indebted to the bank by over one million dollars, and was faced in the fall of 1978 with the prospect of default in the near future if existing debts were not refinanced. The bank was unwilling to extend further credit to Parsons. Under these circumstances, assuming that the bank conditioned the grant of additional credit upon a change in management and ownership, there is no violation of § 1972. Accordingly, the judgment of the District Court is AFFIRMED.

EXHIBIT F

In the Circuit Court of Montgomery County, Alabama

Civil Action No. CV-79-179-G

[Caption Omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF DEFENDANT FIRST ALABAMA BANK OF MONTGOMERY, N.A.*

Defendant First Alabama Bank of Montgomery, N.A. ("Bank"), pursuant to Rule 50(a), ARCP, moved for a directed verdict on February 3, 1983 at the close of plaintiffs' evidence; and on February 7, 1983 this defendant again moved for a directed verdict at the close of all the evidence. This Court denied both motions. Defendant Bank now moves the Court, pursuant to Rule 50(b), ARCP, to set aside the verdict* entered in the above entitled action on February 9, 1983, and to enter judgment in accordance with Bank's aforesaid motion for directed verdict. Bank's said motion for directed verdict should have been granted; and defendant's motion for judgment notwithstanding the verdict should be granted because:

1. The said verdict was manifestly unjust and it is essential in the interest of justice, to avoid a gross miscarriage of justice and to avoid an unconstitutional deprivation of Bank's property without due process of law in violation of the Fourteenth Amendment of the United States Constitution that this motion of defendant be granted.

2. In the light of all the evidence, and with all reasonable inferences considered most favorably to plaintiffs, the facts and inferences point so strongly and overwhelmingly in favor of Bank that reasonable men and women could not arrive at any verdict other than one for defendant.

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*This motion is addressed to the *four* verdicts returned on February 9, 1983. Each ground is addressed to each verdict unless otherwise indicated.

3. The facts and inferences point so strongly and overwhelmingly in favor of defendant, that the Court must conclude that no reasonable men or women could arrive at a verdict for plaintiffs in this action.

4. There is no conflict in material evidence sufficient in law to create a jury question. Moreover, unsupported, self-serving testimony is not, and cannot be, sufficient evidence to create a jury question in this case.

5. There is no evidence of sufficient probative value or substance to support the verdict for plaintiffs in this action.

6. There is insufficient evidence of probative value or substance to support the verdict for plaintiffs in this action.

7. The verdict for plaintiffs is unsupported by evidence of any probative value or substance.

8. The settlement of January 28, 1983, entered into by and among plaintiffs and Orange and OSI, Inc. bars in its entirety plaintiffs' action against this defendant.

9. This jury verdict, if allowed to stand would deprive Bank of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and of the Alabama Constitution of 1901. For the verdict in this case is so gross and extravagant as to exceed the bounds of reason, to result in sheer oppression and punishment, and to result in a gross miscarriage of justice which cannot be tolerated by the law and the constitutional guaranties of due process of law.

10. Defendant's right not to be deprived of property without due process of law guaranteed by the Constitution of Alabama of 1901 and the Fourteenth Amendment of the Constitution of the United States has been denied and violated in that the verdict is punitive in nature and without any probative or substantial evidence of defendant's liability.

11. Defendant's punishment — the amount of damages awarded — so greatly exceeds the alleged wrong that defendant's right not to be deprived of property without due process of law guaranteed by the Constitution of Alabama of 1901 and the Fourteenth Amendment of the Constitution of the United States has been denied and violated.

12. The action brought in the complaint, as amended, of plaintiff Parsons Steel Industries, Inc. is barred in its entirety by the doctrine of *res judicata*. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982). (Copies of that judgment and appellate opinion are attached and made a part of this motion.)

13. The action brought in the complaint, as amended, of plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba Parsons is barred in its entirety by the doctrine of *res judicata*. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A. in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982).

14. The action brought in the complaint, as amended, of plaintiff Parsons Steel Industries, Inc. is barred in its entirety by the doctrine of collateral estoppel. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982).

15. The action brought in the complaint, as amended, of plaintiffs, Parsons Steel, Inc., Jim D. Parsons and Melba Parsons is barred in its entirety by the doctrine of collateral estoppel. This doctrine applies because of the prior adjudication on the merits in Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., in the United States District Court for the Middle District of Alabama, affirmed 679 F.2d 242 (11th Cir. 1982).

16. The evidence requires a finding that this action in its entirety is barred by the doctrine of consent because the plaintiffs consented to the acts, omissions or transactions about which they now complain.

17. The evidence requires a finding that this action in its entirety is barred by the doctrine of estoppel in that plaintiff Jim D. Parsons, for himself and for the other plaintiffs, consented to and willingly participated in the acts, omissions or transactions about which plaintiffs now complain.

18. The evidence requires a finding that this action, in its entirety, is barred by the doctrine of waiver because plaintiff Jim D. Parsons, for himself and for the other plaintiffs, has waived any right or standing to complain about the acts, omissions or transactions alleged in the complaints, as amended.

19. The evidence requires a finding that this action as to plaintiff Parsons Steel Industries, Inc. may not be maintained because that plaintiff has admitted the falsity of all material and relevant allegations of its complaint and has admitted that it is not entitled to any relief. These admissions were made in Parsons Steel Industries, Inc. v. Parsons Steel, Inc., Case No. 79-173-N in the United States Bankruptcy Court for the Middle District of Alabama.

20. Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action and are improper parties to it.

21. The evidence requires a finding that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action and are improper parties to it.

22. The evidence requires a finding that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have not suffered any damages for which they are entitled to recover under their complaint, as amended, and that, as a matter of law, these plaintiffs have no standing to bring this action and are improper parties to it.

23. The evidence is insufficient to support a finding that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons suffered any damages as a result of the matters alleged in their complaint, as amended.

24. There is insufficient evidence to support the damages awarded in this case which awards are so gross, excessive and oppressive as to shock the conscience of the Court and are surely the result of passion, prejudice or other improper motives.

25. The evidence is insufficient to support a finding that any special or fiduciary relationship existed between any plaintiff and this defendant.

26. The evidence requires a finding that no special fiduciary relationship existed between any plaintiff and this defendant.

27. The evidence is insufficient to support a finding that plaintiff Parsons Steel Industries, Inc. was a solvent business at any time material or relevant to this action or to plaintiffs' complaints, as amended.

28. The evidence requires a finding that plaintiff Parsons Steel Industries, Inc. was not solvent at the times material to plaintiffs' complaint, as amended.

29. Plaintiff Parsons Steel Industries, Inc. has, in a prior action, admitted that it was insolvent at all times material to plaintiffs' complaint, as amended.

30. The evidence is insufficient to support a finding that financial information concerning plaintiff Parsons Steel Industries, Inc. in the December 21, 1978 letter to creditors was false or misleading.

31. The evidence requires a finding that the financial information concerning Parsons Steel Industries, Inc. contained in the December 21, 1978 letter to creditors was not fraudulent, false or misleading.

32. The evidence requires a finding that this defendant supplied none of the financial information concerning Parsons Steel Industries, Inc. contained in the December 21, 1978 letter to creditors which plaintiffs allege to be false, fraudulent or misleading.

33. The evidence is insufficient to support a finding that the proposed composition of creditors was done at the request or direction of this defendant.

34. The evidence requires a finding that the proposed composition of creditors was not done at the request or direction of this defendant.

35. The evidence requires a finding as a matter of law that the sale of the collateral on January 17, 1979 was commercially reasonable. *First Alabama Bank of Montgomery, N.A. v. B&E Steel Services, Inc.*

36. The evidence is insufficient to create an issue of fact as to whether the sale of the collateral on January 17, 1979 was commercially reasonable. *First Alabama Bank of Montgomery, N.A. v. B&E Steel Services, Inc.*

37. The evidence is insufficient to support a finding that the collateral was sold for an amount substantially less than its fair market value, or that there was a lack of notice. As a matter of law, for the sale to have been commercially unreasonable, both circumstances must have taken place and must have combined to proximately cause damage to any plaintiff claiming damages for alleged commercial unreasonableness. *First Alabama Bank of Montgomery, N.A. v. B&E Steel Services, Inc.*

38. The evidence is insufficient to support a finding that the collateral was sold at a substantially lower price than the collateral would have sold for at a commercially reasonable sale.

39. The evidence requires a finding as a matter of law that the collateral was not sold at substantially lower price than said collateral should have brought at a commercially reasonable sale.

40. The evidence is insufficient to support a finding that the sale of the collateral was not commercially reasonable.

41. The evidence requires a finding that the sale of the collateral was commercially reasonable.

42. The evidence requires a finding that plaintiffs waived notice of disposition of the collateral.

43. The evidence requires a finding that as a matter of law, plaintiffs consented to the time, manner and price of the sale of collateral about which they now complain in this action.

44. The evidence is insufficient to support a finding of any damages proximately caused by the alleged insufficiency of the notice of disposition of the collateral.

45. There is no evidence sufficient to support the damages awarded in this case which awards are so gross, excessive and oppressive as to shock the conscience of the Court and of a civilized legal system, and are surely the result of passion, prejudice or other improper motives.

46. The evidence is insufficient to warrant a finding of fraud. The alleged fraudulent representation was a promise of further financing. Since this representation involves a promise to perform or abstain from some act in the future, for there to be fraud, there must be evidence that at the time the promises of future action or abstention were made, the promisor had no intention of carrying out the promises, but rather had a present intent ot deceive. The great weight and preponderance of the evidence does not support such a finding; and there is no evidence of sufficient probative value or substance to support such a finding.

47. The evidence is insufficient to support a finding that any promise of further financing was made. Jim D. Parsons himself testified that Herbert said that further financing might not be necessary. June Neely Williams testified that Herbert said that

further loans would be made if Michael Orange thought they were necessary. Michael Orange testified that upon discovering how bad the financial condition of the company actually was, further loans were out of the question.

48. The evidence is insufficient to warrant a finding that defendant, at the time a promise was made, if it was made, had no intention of carrying out the promise, but rather had a present intent to deceive. Indeed, there is no such evidence. This intent must be substantiated by the evidence; it was not so substantiated; and the fraud claim of plaintiffs was erroneously submitted to the jury. Mere failure to perform a promise is not of itself evidence of intent not to perform at the time the promise was made. This intent to defraud must be clearly and satisfactorily proved by a preponderance of the evidence, and a jury has no untrammeled discretion to speculate upon the existence of fraudulent intent.

49. The evidence is insufficient to support a finding that this defendant led plaintiffs to believe that all loans would be renewed.

50. The evidence is insufficient to support a finding of any illegal conspiracy between this defendant and other defendants, or among defendants and Orange and OSI.

51. The evidence is insufficient to support a finding of any fraud by this defendant.

52. The evidence is insufficient to support a finding that this defendant was dealing with any plaintiff in any manner other than at arms length.

53. The evidence is insufficient to support a finding that defendant Edward Herbert on or about December 12, 1978, or at any other time, promised that Bank would lend additional funds to any plaintiff.

54. The evidence is insufficient to support a finding that any such promise of additional funds referred to in paragraph 53, if made, was made with no intention of performance and with actual intent to deceive.

55. There is a total absence of evidence of coercion or duress; those issues are not adequately raised by the pleadings or contentions; and the Court erred in submitting those issues to the jury.

56. The evidence is insufficient to support a finding of coercion or duress.

57. The evidence is insufficient to support a finding that this defendant forced any plaintiff to convey any real estate owned by Parsons Steel, Inc.

58. The evidence is insufficient to support a finding that this defendant converted any property of any plaintiff to this defendant's own use.

59. The evidence is insufficient to support a finding that this defendant conspired to convert plaintiff's property to defendant Herbert's or defendant Bank's own use.

60. The evidence is insufficient to support a finding that plaintiff has been damaged as a proximate result of any acts or omissions of this defendant.

61. Punitive damages are not recoverable as a matter of law for plaintiffs' claim concerning the commercial reasonableness of the sale of the collateral.

62. The evidence is insufficient to warrant submission to the jury of the issue of punitive damages.

63. The evidence requires a finding as a matter of law that the issue of punitive damages cannot be submitted to the jury, and that no plaintiff is entitled to punitive damages from this defendant.

64. The evidence is insufficient to warrant a finding that any plaintiff relied to their detriment on any representations allegedly made by this defendant.

65. The evidence requires a finding that this defendant is guilty of none of the wrongs asserted by any plaintiff in their complaints and contentions; and requires, moreover, a verdict in favor of this defendant on all issues involved in this action.

WHEREFORE, the above specified grounds, separately and severally, entitled defendant to a directed verdict — and now entitle defendant to a judgment N.O.V..

STEINER, CRUM & BAKER

BY M. R. Nachman, Jr.

BY James A. Byram, Jr.

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION
No. 83-V-181-N
[Caption Omitted]

ANSWER OF A. POPE GORDON

COMES NOW A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc., Defendant in the above-styled action, and answers the Complaint of Plaintiff First Alabama Bank of Montgomery, N.A. ("Bank") and Edward Herbert ("Herbert") as follows:

1. Trustee admits the allegations of Paragraphs 1 and 2 of Plaintiffs' Complaint.

2. Trustee denies the allegation contained in Paragraph 3 of Plaintiffs' Complaint in that it fails to list all of the Defendants and Plaintiffs in the original action as filed, Parsons Steel Industries, Inc., et al. vs. First Alabama Bank of Montgomery, N.A., et al., Civil Action No. CV-79-179-Ta. In the original Complaint, as adopted by Trustee, the additional parties of Michael Orange and OSI, Inc. were named defendants. Said Michael Orange and OSI, Inc. were dismissed pursuant to a pro tanto settlement and release entered immediately prior to the trial in State court.

3. Trustee admits the allegations in Paragraph 4 and states that Trustee was not a party to said action.

4. Trustee denies that this Court has jurisdiction of this action with regard to Trustee under 28 U.S.C. §2283 or under the cases cited by Plaintiffs. In support of this contention, Trustee urges that pendant party jurisdiction over Trustee, Michael Orange, and OSI, Inc. could not have been asserted in the Federal action. *Aldinger v. Howard,* 427 U.S. 1, 49 L.Ed.2d 276, 96 S.Ct. 2413 (1975).

5. As to the allegations contained in Paragraph 6 of Plaintiffs' Complaint, Trustee denies that "This Complaint generally avers fraud in connection with an alleged requirement by Bank that Parsons Montgomery change its management and ownership as a condition for further financing and alleged violations of Alabama law in connection with subsequent repossession and sale of the property of Parsons Montgomery." Although the February 15, 1979 Complaint does allege fraud, it does so with specificity regarding acts of the Bank and its officers. Furthermore, the Complaint as Amended alleges a number of separate causes of action. Specifically, Trustee alleged in his Amended Complaint that the Bank had violated provisions of the Uniform Commercial Code in the foreclosure and sale of repossessed property.

6. As to Paragraph 7 of Plaintiffs' Complaint, Trustee admits the first sentence of Paragraph 7. As to the second sentence of Paragraph 7, Trustee neither admits nor denies the general and broad allegations of the second sentence, but states that it is within the knowledge and understanding of Trustee that the Complaint filed on March 30, 1979 by "Parsons - Mobile", "Jim D. Parsons" and "Melba L. Parsons" was bottomed on allegations of violation of the Federal Bank Holding Company Act.

7. Trustee denies the allegations of Paragraph 8 that the "Complaints in both State action and Federal action are virtually identical." Trustee generally denies the broadly stated argument in the remainder of Paragraph 8.

8. Trustee admits those allegations in Paragraph 9 of Plaintiffs' Complaint that this Honorable Court bifurcated liability from other issues in the "Federal action". Trustee admits that this Honorable Court granted "Bank's Motion for JNOV and set aside the jury verdict and rendered an Order and Judgment of June 17, 1981. Trustee admits that the Eleventh Circuit affirmed this Honorable Court's judgment on June 25, 1982 at 679 F.2d 242.

9. As to Paragraph 10 of Plaintiffs' Complaint, Trustee admits that "Bank" and "Herbert" unsuccessfully raised the grounds of *res judicata* and collateral estoppel as a bar to further proceedings in the State action. Trustee states further that "Bank" and "Herbert" have raised those same grounds in their motions for new trial or JNOV with the State court.

10. As to the allegations of Paragraph 11, Trustee generally denies the argument of counsel asserted therein.

WHEREFORE, Trustee respectfully submits that Plaintiffs are not entitled to preliminary or permanent mandatory injunctive relief against any Defendants, and specifically as not against Defendant A. Pope Gordon, and as additional reasons therefor, cite this Honorable Court to the arguments contained in the brief of Trustee attached hereto.

Respectfully submitted,

JAMES JERRY WOOD

THOMAS R. DEBRAY

Attorneys for Trustee

ANSWER OF DEFENDANTS PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS

First Defense

1. This Court lacks jurisdiction of Plaintiffs' complaint.

Second Defense

1. This Court lacks jurisdiction of these Defendants.

Third Defense

1. This Court lacks jurisdiction to grant Plaintiffs the relief they request.

Fourth Defense

1. Plaintiffs complaint fails to state a claim upon which relief can be granted.

Fifth Defense

1. These Defendants admit paragraphs one, two, three, and four.

2. These Defendants deny paragraphs five, eight, and eleven.

3. These Defendants admit the allegations contained in the first sentence of paragraph six buy deny all other allegations in that paragraph and demand strict proof thereof.

4. These Defendants admit the allegations in the first and last paragraphs and paragraph nine but deny the allegation in the second paragraph of paragraph nine and demand strict proof thereof.

Sixth Defense

1. Plaintiffs have waived their right, if any, to the relief sought in their complaint.

Seventh Defense

1. Plaintiffs' complaint is barred by laches.

Eighth Defense

1. Plaintiffs lack the "clean hand" necessary to entitle them to the relief sought in their complaint.

Ninth Defense

1. Plaintiffs are estopped from seeking the relief sought in their complaint due to their continued litigation of the state action.

BEASLEY AND WILSON

BY: FRANK M. WILSON

Attorneys for Defendants
Parsons Steel, Inc., Jim D. Parsons
and Melba L. Parsons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action at Law
Case No. 83-V-181-N

First Alabama Bank of Montgomery, N.A.,
and Edward Herbert,

Plaintiffs,

vs.

Parsons Steel, Incorporated; Jim D. Parsons;
Melba L. Parsons; and Parsons Steel Industries, Inc.;
and A. Pope Gordon, as Trustee in Bankruptcy for
Parsons Steel Industries, Incorporated,

Defendants.

* * *

**HEARING ON REQUEST FOR
PRELIMINARY INJUNCTION**

* * *

BEFORE the Honorable Robert E. Varner, District Judge, at the Courthouse, Montgomery, Alabama, on March 17, 1983.

* * *

Appearances

For the Plaintiffs:	Steiner, Crum & Baker Attorneys at Law Montgomery, Alabama
	BY: M.R. Nachman, Jr., Esquire
For the Defendant Parsons:	Beasley & Wilson Attorneys at Law Montgomery, Alabama

BY: Jere Beasley, Esquire
and Frank Wilson, Esquire

For the Defendant Trustee: Wood, Minor & Parnell
Attorneys at Law
Montgomery, Alabama

BY: J. Jerry Wood, Esquire
and Thomas R. DeBray, Esquire

* * *

Official Reporter
Lewis F. Wimberley

[2] THE COURT: Calling the case of the First Alabama Bank versus Parsons Steel and others.

This case is set for a hearing on a Petition for a Preliminary Injunction. Do you really need to take any evidence in the case?

MR. NACHMAN: Your Honor, we have a few documents which we would like to introduce, but no oral testimony.

MR. WILSON: Your Honor, for the Defendant Parsons, we have some documents.

MR. WOOD: And on behalf of the Trustee, we are in the same position; we have some documents.

THE COURT: All right.

MR. NACHMAN: Your Honor, in view of that circumstance, we wonder whether the Court could, under Rule 65-2, whether the Court could take the whole matter under consideration for preliminary and permanent?

THE COURT: It seems to me it would not be inappropriate.

What position do you take about that?

MR. WILSON: I can't see that there would be any distinction between the two, and we would think it would be appropriate.

THE COURT: Mr. Wood?

MR. WOOD: No objection to your doing that, Your Honor.

[3] THE COURT: Seems to me it would save everybody a lot of time and trouble.

I think that it may be that since all of you have filed briefs prior to the time of the presentation of this matter, that it is possible some of you may want to file briefs afterward, if we don't hash it out. And we will talk about that at the end of this hearing after we have heard the arguments.

All right. Offer your evidence, please, sir.

MR. NACHMAN: Your Honor, we would like to offer all of the exhibits attached to the Complaint, which are Exhibits A through E respectively. And either as Exhibit 1 or F, as the Clerk might prefer —

THE COURT: I am sorry. I didn't understand you. Move back there and use the speaker, please, sir.

MR. NACHMAN: We have numbered the exhibits to the Complaint as A through E, which I have just introduced in evidence. Our next exhibit we can number either F or 1, as the Clerk would prefer.

THE COURT: Well, it may be that it would be well to number it 1 to distinguish it from those that are already attached to the file.

MR. NACHMAN: All right, sir. Exhibit 1 is the Civil Case Action Summary from the State Court proceeding.

Do you have a copy of that?

[4] MR. WILSON: Yes, sir.

MR. WOOD: Yes, sir.

MR. NACHMAN: Our Exhibit 2 is a witness list from the Federal action which is taken from the transcript of the pro-

ceedings in this court which were filed with the Eleventh Circuit Court of Appeals in connection with the appeal.

Do you all have a copy of that?

MR. WILSON: Yes.

MR. NACHMAN: Do you need a copy?

MR. WOOD: Yes, sir.

MR. NACHMAN: Our next Exhibit 3, Your Honor, which we offer, is a witness list of those who testified in the State action for the Plaintiffs and for the Defendants, which I prepared and have shown to counsel. It is certainly subject to correction if my recollections and notes were inaccurate. This is Exhibit 3.

THE COURT: All right.

MR. NACHMAN: Exhibit 4, Your Honor, which we offer, is a witness list filed in the State Court proceedings by Pope Gordon, the trustee in bankruptcy, on August 16, 1982.

Our next Exhibit 5, Your Honor, is the witness list filed in the State action by the other Plaintiffs, Parsons Steel, Inc., Jim Parsons and Melba Parsons.

[4] THE COURT: As I understand it, your Exhibits 2 and 3 are lists of witnesses as you recall them who testified?

MR. NACHMAN: Yes, sir.

THE COURT: The others are lists as filed by the parties?

MR. NACHMAN: In advance of trial as the witnesses they expected to call, yes, sir.

THE COURT: All right.

MR. NACHMAN: And Exhibit 2, Your Honor, is taken from the transcript of the Federal proceedings. Those are the witnesses who did indeed actually testify.

THE COURT: You are simply not sure about Exhibit 3 being complete?

MR. NACHMAN: Well, I am sure, but I realize that counsel's recollection may be different from mine —

THE COURT: I have seen lawyers who were sure before.

But, go ahead. We will give everybody an opportunity to correct those if you . . .

MR. NACHMAN: Exhibit 6, Your Honor, is the witness list filed in advance of the Federal trial by the Plaintiffs in that action.

Exhibit 7 consists of a copy of pages 24 through 35 of the transcript of the Federal proceeding which consists of opening argument made by Mr. Beasley and counsel [5] for the Plaintiffs in the Federal action

Exhibit 8 consists of pages 956 through 969 of the —

THE COURT: 956?

MR. NACHMAN: Through 969 of the transcript of the Federal action. And that consists of a portion of the closing argument made by Mr. Beasley on behalf of the Plaintiffs in that action.

Exhibit 9, Your Honor, is a copy of the Summons and Complaint in another State action brought by Jim Parsons, Melba Parsons and Parsons Steel against First Alabama Bankshares, First Alabama Bank of Montgomery, and Merchants National Bank. It was served on March 9, 1983 and seeks one hundred nineteen million dollars against First Alabama Bank of Montgomery and the other Defendants.

THE COURT: Of course, this is not the suit in which they recovered?

MR. NACHMAN: No, sir.

THE COURT: It is a suit against whom?

MR. NACHMAN: It is a suit against First Alabama Bank of Montgomery, First Alabama Bankshares — the holding company — and Merchants National Bank in Mobile. It was served on us on March the 9th, two days after we brought this action in this court, Your Honor. And it [6] alleges, insofar as this bank is concerned, that this bank tried to coerce a settlement of the state action we are concerned with, and asks damages in the amount of one hundred nineteen million dollars against First Alabama Bank of Montgomery, along with the other two Defendants.

It comes within the scope of our prayer for injunctive relief as to other related actions. And I believe it is sub-E of our prayer for relief.

MR. WILSON: For the Record, we would object to that exhibit in that I certainly don't believe it could possibly be arising out of . . . since the matters complained of in the most recent lawsuit all ocurred in the years 1982 and 1983, we certainly don't believe it could possibly, by any stretch of the imagination, be barred by a case tried in this court in May of 1981. Secondly, it was not my understanding until we got here this morning that they were seeking to enjoin that litigation.

So, for the Record, we would object to the admission of that document.

THE COURT: Well, are you seeking to enjoin the action filed March 9th?

MR. NACHMAN: Yes, sir.

THE COURT: It wasn't filed until after this suit was filed?

[7] MR. NACHMAN: Yes, sir. It was filed, according to the Clerk's Office, on the 3rd of March. It was not served on us until the 9th of March.

THE COURT: Well, you didn't mention it in your Complaint, did you?

MR. NACHMAN: No, sir, except that it is included in the prayer for relief as to the institution and prosecution of any other or different actions in the State or Federal court which seeks to re-litigate therein matters which were or could have been litigated in the Federal action.

If the Court feels that we should amend, we would ask leave to amend to specify this as an event which occurred after the drafting and filing of this.

THE COURT: I am inclined to think that they have a right to put it in if it is not in, Mr. Wilson. Obviously you would have a right to amend your situation. I don't know exactly what you may want to amend so as to fully consider that aspect of it.

I don't know anything about that suit, obviously. Whether or not it would be involved in the same series of litigations, I have no opinion about it.

MR. WOOD: Judge Varner, for the Record, the Trustee A. Pope Gordon is not a part of and has no interest in this particular lawsuit or those pleadings.

[8] MR. NACHMAN: That is correct, Your Honor. We do not offer it as to the Defendant Trustee.

THE COURT: All right; it is excluded as to the Trustee.

Anything else?

MR. NACHMAN: That is all for the Plaintiff, Your Honor.

THE COURT: All right. Do you have any evidence you want to offer?

MR. WILSON: Yes, sir.

Your Honor, we have a number of pleadings from the State litigation that we would offer, as well.

I would first like to ask the Court if it would be appropriate for this Court to take judicial notice of the matters in the Federal litigation which, of course, was tried before this Court?

THE COURT: It is appropriate for the Court to take judicial knowledge of it. But I, like Mr. Nachman, I don't completely trust my recollection. I want each of you to feel free to contribute to my recollection of what is in the Record in the Federal case. I know you have all reviewed it since I have, and I don't pretend to remember everything.

MR. WILSON: I had to go back and review it before I had much of a recollection of it, Judge.

[9] I will, then, ask the Court, when I get through with these exhibits in the state action, that I might refer to some of the exhibits . . . some of the pleadings in the federal action without actually submitting them as a numbered exhibit this morning.

MR. NACHMAN: Your Honor, would it help —

THE COURT: Well, Mr. Nachman wants to be heard on the matter.

MR. NACHMAN: I just wanted to say that I would stipulate, Your Honor, that any party can ask the Court to take judicial notice of any of the materials on file in the federal action, if that would help.

THE COURT: Thank you.

MR. WILSON: I will just refer to us as the Parsons Defendants, as separated from the Trustee.

Our first exhibit would be the Defendants — in the state court action — renewed motion to dismiss, which was filed on the 24th of October, 1979. Number 1 would be the bank's motion to dismiss.

Parsons Defendants' Exhibit No. 2 —

THE COURT: Wait a minute. I am a little bit confused.

MR. WILSON: All right, sir.

THE COURT: You said Defendant Parsons' Exhibit 1 was what, now?

[10] MR. WILSON: It is the bank's motion to dismiss, filed October 24, 1979, in the state action.

THE COURT: All right.

MR. WILSON: Number 2 would be renewed motion to dismiss in the state action by Defendant Herbert, filed the same day, October 24, 1979.

Parsons Defendant Exhibit 3 would be the order of the Circuit Court in the state action dated December 12, 1979, which ordered that the Trustee in Bankruptcy be made a party to that action, and granted the motions that are referred to in Exhibits 1 and 2, to that extent.

THE COURT: Granted the motions to dismiss?

MR. WILSON: As to . . . In lieu of granting them . . . The basis for the motion to dismiss was that they had no standing, they were improper parties. And he ordered that this proper party be made a party to the state action on the request of the Defendants.

THE COURT: All right.

MR. WILSON: Exhibit 4 would be the order of the Circuit Court dated March 17, 1982, denying Defendant bank and Herbert's summary judgment motion which was premised on res judicata.

Exhibit 5 would the the Defendants' motion to strike, or in the alternative, answer the second amended Complaint in the state action, which was filed on June 22nd, **[11]** 1982.

Number 6 would be a notice of intent to serve subpoena filed in the state action by Defendants on August 6, 1982.

Number 7 would be a request for production of documents filed by the Defendants in the state action on July 22nd, *1983*.

Number 8 would be an order of the Circuit Court dated January 6, 1983, on a renewed motion for summary judgment by the Defendants based on the res judicata defense.

Exhibit 9 is the contentions of the Defendants First Alabama Bank and Edward Herbert in the state action, which was filed therein on January 17, 1983.

THE COURT: Contentions?

MR. WILSON: The contentions as to the matters that were raised in that lawsuit.

THE COURT: Is that a state court pleading I am not familiar with, or —

MR. WILSON: Yes, sir.

THE COURT: What is it?

MR. NACHMAN: It has arisen recently, Your Honor. I dont' know what kind of animal it is.

MR. WILSON: The state court requested that all parties file written statements of their contentions of **[12]** the issues in that lawsuit, what as to the Plaintiff . . . It is similar to what this Court requires prior to encompassing that in a pre-trial order. But in the state action, no pre-trial order was entered. But the case was tried on the basis of the contentions filed by the parties.

THE COURT: I follow you.

MR. WILSON: Exhibit 10 is the contentions of the Plaintiffs, Parsons, Parsons Steel, Inc., Jim Parsons, and Melba Parsons, in the state action, which were filed on January 13 of 1983.

Number 11 would be the Defendants, in the state action, motion for reconsideraton and renewed motion for summary judgment. This, again, based on the res judicata ground, and was filed in the Circuit Court action on January 19, 1983.

Exhibit 12 is the list of documents filed by Defendants First Alabama Bank and Edward Herbert in the state court action on January 26th, 1983.

Exhibit 13 is Defendants' Bank and Herbert's alternative motion to reconsider or for a continuance, which was filed January 28, 1983 in the state court action.

Exhibit 14 is a cross-claim by Defendants Bank and Herbert against O.S.I. and Michael Orange, the other [13] Defendants in the state court action. This cross-claim by the bank was filed on January 28, 1983.

Exhibit 15 is another renewed motion for summary judgment by these Defendants filed January 28, 1983.

Exhibit 16 is, in the state action again, the objections of the bank and Herbert to the dismissal of the other Defendants pursuant to a pro tanto settlement which was reached between the other Defendants, Mr. Orange and O.S.I., and the Plaintiffs in that case.

Exhibit 17 is an amendment to the Answer of the Defendant First Alabama Bank asserting that the pro tanto settlement was a complete bar to the state action. This was filed on January 17, 1983.

Exhibit 18 is the same pleading filed by the Defendant Herbert; and amendment to his Answer, filed January 28, 1983.

Exhibit 19 is the Answer of First Alabama Bank to the Plaintiff's Complaint in the state action. It was filed on March 25 of 1982 and asserted a counterclaim against the Plaintiffs, as well as answering their initial Complaint.

Exhibit 20 is an order from the Circuit Court denying Bank and Herbert's renewed motion for summary judgment. This order is dated January 31, 1983.

Exhibit 21 is the Defendants' requested voir dire **[14]** questions of the jury panel in the state action, which was filed on January 31, 1983.

Exhibit 22 is a certified copy of the jury verdict in the state action and the judgment of the Court affirming that jury verdict.

THE COURT: All right, sir.

MR. NACHMAN: We have no objection to those exhibits.

THE COURT: All right, sir.

Mr. Wood?

MR. WOOD: Your Honor, I had planned to offer the renewed motions to dismiss of the bank that are now Exhibits 1 and 2 for Parsons. And, so, I don't have any exhibits to offer. I will adopt those first two.

THE COURT: All right. Thank you.

Now, one group, the Plaintiffs, got their briefs in in time for me to read them. Mr. Wilson got his in this morning, but I did little more than scan them. I haven't even seen yours except I know that they are in there.

MR. WOOD: Yes, sir.

THE COURT: I tell you that so as to . . . It might be pertinent to your argument. I will give you such time to argue this case as you want. Do you have some idea as to what time you need?

[15] We will start with Mr. Nachman. Have you had an opportunity to look at the briefs?

MR. NACHMAN: No, sir. They were handed to me this morning.

Your Honor, I am prepared to argue this morning. If the Court would prefer to re-schedule argument until after all the briefs are —

THE COURT: No, sir. I had rather hear you this morning and then decide whether or not we need any more. I don't know whether we do or not. I think I understand the position the parties are taking.

Mr. Wilson, of course, in addition to the things you anticipated, has taken the position that, assuming you are relying on res judicata or collateral estoppel, as they may relate to each other and the facts of this case, that you are estopped to assert your estoppel because of your participation in the state case.

MR. NACHMAN: I understand that and am prepared to argue that.

THE COURT: And I think the other things that he raises have been anticipated by you and pretty well covered in your briefs. I, of course, do not know what Mr. Wood has taken to task in his brief.

Have you done anything startlingly different from what Mr. Wilson did?

[16] MR. WOOD: I have done nothing that will startle Mr. Nachman. He knows our position.

THE COURT: All right. You may startle me, but I reserve the right to be startled.

MR. WOOD: Yes, sir.

MR. NACHMAN: Shall I proceed?

THE COURT: Yes, sir. How much time do you need to the side?

MR. NACHMAN: I would say fifteen minutes, with maybe five minutes rebuttal.

THE COURT: Well, I think you are being modest. Let me give you thirty minutes, if you need it, to the side.

Is that enough for you, Mr. Wilson?

MR. WILSON: I think that would be more than enough.

THE COURT: I would think if it is enough for them, it is enough for you?

MR. WOOD: That is right, Your Honor.

THE COURT: All right.

MR. NACHMAN: If the Court please, I will start on the last point that was mentioned a few moments ago; namely, whether we are estopped by continuously raising the res judicata and collateral estoppel defenses in the state actions and going ahead with a trial before filing an independent action in this court seeking injunctive [17] relief under Section 2283 under Title 28, saying to this Court that it is now necessary — to use the words of the statute — that this Court issue that injunction in order to protect or effectuate its judgment in the federal action, as we denominated in our pleadings.

Now, the answer to the question is a very simple one. The fact that the federal courts have jurisdiction — and they do without question have jurisdiction as the Fifth Circuit, for example, has repeatedly held in Southwestern Airlines and other cases we have cited — they have independent jurisdiction under 2283 to issue an injunctive order to protect or effectuate its judgments. This does not mean, as the cases and the commentators are plain to point out, that all other aspects of the appropriateness of injunctive relief go out the window. They do not. And notably those that remain are that there must be a necessity for an injunction, realizing that it is an extreme form of judicial relief, and that there must not be any other adequate remedy. And, moreover, where state and federal courts are involved, traditional doctrines of comity also are present when a federal court is asked to enjoin a state court.

And, so, the answer, as I say, is quite simple: Had we not raised repeatedly and given, up to the very day of the trial, an opportunity to the state court to **[18]** rule on this matter, the first thing we would have been faced with over here would have been that we had not asked the state court to rule on this defense and how do we know it isn't going to do so.

Not only did we raise the defense in all the pleadings that have been introduced here, but we also raised it in motions for directed verdict . . . two motions for directed verdict by each Defendant, Bank and Herbert, during the course of the state action and, also, in the judgment n.o.v. which has not been ruled on. Why is it necessary now . . .

Well, before I get to that, let me also say that in addition to all of the matters that the Defendants here have put in, the minutes of the Circuit Court which we introduced will show that we even asked the Court to certify an interlocutory appeal to the Supreme Court of Alabama so that the Supreme Court of Alabama, in advance of a long and burdensome trial, could rule on that question. And that, too, was denied by the Circuit Court.

The record in the state court will also reveal that the motions of these Defendants here — Plaintiffs in the State action — for summary judgment on our counter-claim were based, remarkably enough, on the argument that res judicata and collateral estoppel barred our counter-claim because we had filed a counter-claim in **[19]** this federal action. And, lo and behold, the state court granted those summary judgments and dismissed our counter-claims on the basis of res judicata.

So, when we got a four million dollar judgment which we have now had to stay execution on and when we are now faced with another one hundred nineteen million dollar lawsuit which alleges in many, many paragraphs matters relating to this state action that was tried, and saying that there was collusive effort among the Defendants in that new state action to force a settle-

ment of the state action, it is clearly related to this. Because if it is barred by res judicata, the whole thing falls to the ground over there.

Now, there is no waiver, there is no estoppel of raising the matter that a federal injunction is necessary to protect or effectuate this Court's earlier judgment. Either it is necessary to protect it, or it isn't necessary to protect it. And we say it is patently clear at this time that a federal injunction is necessary to protect this Court's order because we are now in the stage of harassment and re-litigation, and the really burdensome features — not that there haven't been burdensome features already from the state court litigation, but nothing like what we are now faced with.

We gave the state court every conceivable opportunity **[20]** to . . . motion after motion after motion, even a continuance on the day of trial was sought, and motions for directed verdict, motions for judgment n.o.v., everything we knew how to do to try to raise this matter in the state court, and we haven't been successful.

Now, we have cited in our brief and discussed at some length the case of Bank of Heflin in Bank of Heflin against Miles, at 621 Fed2d 108. All of these matters were involved there. A federal court injunction did not come down in that case under Section 2283 until after the case had been to the Supreme Court of Alabama for the second time and the Supreme Court of Alabama had sent the case back to state circuit court with instructions to assess a statutory penalty, which is available where stockholders asked to look at corporate records and are denied access to corporate records. And if the courts, as Your Honor knows, hold that the stockholders are entitled to look at the corporate records, then they are also entitled to a statutory penalty because of the corporation's failure to make those available. And it was . . . In an earlier action after the state court had originally ruled that the records were available for inspection, bank records were available as ordinary corporate records were

available for inspection by stockholders of the bank, the bank and the FDIC went into the federal [21] court in Birmingham and obtained an order that the FDIC records could not be inspected. Thereafter, the Supreme Court of Alabama not only held that they could be, but that reversed . . . remanded the case to the circuit court, as I say, for assessment of a statutory penalty. And at that stage, a new action was entertained by the Federal District Court in Birmingham, Judge Guin, and he issued an injunction under 2283 enjoining all those state proceedings and nullifying all state court orders, including orders of the Supreme Court of Alabama. And this was done after two trips to the Supreme Court of Alabama in the case and hearings in the circuit court.

This injunction was upheld as necessary to protect the earlier order of the federal court in a related case that the FDIC records could not be inspected by stockholders of this bank.

So, as I say, the essential issue is: Is it necessary for this Court to enjoin any further proceedings and to nullify the state court orders which conflict with its judgment n.o.v., dismissing this action.

Now, as to the similarity, we have given a side by side comparison of the allegations in the state complaint; allegations not only of these Defendants but adopted by those Defendants. Insofar as the parties are concerned, the citations to Aldinger are misplaced. What they are [22] saying to the Court then is that Orange and O.S.I. and the Montgomery corporation — which is in bankruptcy now and represented by the Trustee — were not parties to the litigation before Your Honor. They were not. That is correct. But that circumstance is legally irrelevant.

Insofar as Orange and O S.I. were concerned, number one, they were dismissed from the state action after the settlement with them. But even if they hadn't been, they could have been made parties to the federal litigation before Your Honor. Many of the cases of — and I won't read the citations. Harper, for ex-

ample, that we have cited in our brief — point to the liberal joinder provisions in the federal courts and the pendent jurisdiction of the federal courts, to hold that a person is bound not only by what he raised in the federal court but what he could have raised in the federal court.

THE COURT: Let me interrupt you just a second now. I don't think this will throw you off and it is distracting me just a little bit.

O.S.I. was Orange's corporation under which he was operating?

MR. NACHMAN: That is correct.

THE COURT: My recollection is hazy about that.

MR. NACHMAN: That is exactly correct, Your Honor.

THE COURT: All right.

[23] MR. NACHMAN: The Aldinger case and the later Kroeger of the Supreme Court of the United States do not hold, as the Defendants here would have Your Honor believe, that there is no pendent party jurisdiction in the federal court. Quite the contrary. What those cases hold is that unless there is a demonstrable, manifest, congressional intent that certain parties not be . . . certain persons not be parties in the federal court, under the limited jurisdiction of the federal court, then there can be pendent party jurisdiction and, indeed, is.

In the Aldinger case, what the Supreme Court was careful to point out was that a county cannot be a party in a 1983 action because Congress, when it enacted 1983, did not consider that counties were persons within the meaning of Section 1983 of Title 41. And in the later Kroeger case, which was a diversity matter where a non-resident . . . where an Iowa resident sued a non-resident of Iowa, and then the non-resident of Iowa sued . . . interpleaded a resident of Iowa as a third party-Defendant, and then the Plaintiff also sued the third party defendant, and the

court dismissed the non-Iowa defendant, leaving only an Iowa plaintiff and an Iowa defendant in the case. The court held that there could not be pendent party jurisdiction in that case because Congress had indeed made an expressed determination that there was [24] to be no federal jurisdiction based on diversity of citizenship where the plaintiff and the defendant were residents of the same state.

But, again, the court was careful to point out that it was not talking about subject matter jurisdiction where . . . which was based upon a federal statute or the federal Constitution, which is the case in Your Honor's case because that was based under federal statute.

Now, there are several cases cited by the Fifth Circuit . . . I mean, the Eleventh Circuit and by us arising out of the Bank Holding Company Act — they were cited by the Eleventh Circuit in the case which upheld and affirmed Your Honor — Tose from Pennsylvania, Duryea from the Seventh Circuit, Clark from the Tenth Circuit. In each one of those cases, number one, state fraud actions, state interference with advantageous business relation actions, other types of commercial tort actions were joined with an assertion of liability under the Bank Holding Company Act, just as they could have been in the case before Your Honor. And, in addition to that, persons other than banks were defendants along with the bank in those actions. In Tose, for example, and in B.C. Recreation, for example, and in Duryea, for your example.

So that there is no reason under the sun why these persons not only couldn't have tried to bring these other [25] parties and bring these other causes of action before Your Honor when they, not we, invoked the jurisdiction of the federal court and sued under the Bank Holding Company Act. The odds are overwhelming that had they done so, they would have been accepted. But that is not the case; that is not the test. The test is whether they tried or not, and they didn't try and they elected not to true.

And if Your Honor will read the side by side comparisons of these two Complaints, the federal and state Complaints, and see that they are literally identical in all relevant aspects.

Now, as to the Trustee in Bankruptcy. First of all, many of the cases we cite make it plain that a party can be bound by collateral estoppel or res judicata, for that matter, in an action in which he has not actually been a party, provided his interests are adequately represented.

Now, what do we have here? First we have the Trustee representing the Montgomery corporation which is wholly owned by the Mobile corporation. The Mobile corporation was a party in the federal action, a party-plaintiff. And ninety-nine out of one hundred shares of stock in the parent corporation were held by the two other Plaintiffs in the federal action before Your Honor. That alone would be enough, but that is not all that there [26] was.

The laboring oar, the interests that were asserted to get money for alleged wrongs to the Montgomery corporation — and those are the matters that were before Your Honor: Wrongs alleged to have occurred to the Montgomery corporation, failure to lend the Montgomery corporation money, improperly levying on the assets of the Montgomery corporation and selling them — alleged in both Complaints — in a commercially unreasonable manner. These matters were fully litigated before Your Honor. The representation was highly adequate by Mr. Beasley and Mr. Wilson. And they were so adequate that the Trustee, in making these same arguments in state court, his witness list was, "we designate the witnesses from the federal action," there is no question that there was adequate representation.

And in the Southwest Airlines case that we have cited, for example, eight parties were held to be bound which were not actual parties in this case. In the Montana against United States case which is cited in any number of the cases we have cited, the

United States government was held to have been bound by representation of a public contractor who was suing in the state courts of Montana to contest the constitutionality of a gross receipts tax on public contractors, which the economic burden would fall **[27]** on the federal government for which the contractor was doing this business, and the United States government tried to bring another action in a three judge court to enjoin this statute as unconstitutional. The United States Supreme Court in Montana said, "It has already been litigated. You are barred by res judicata and collateral estoppel because the private contractor adequately represented the interests of the United States government in that case."

So, we say, Your Honor, that this is a classic case for the protection of jurisdiction and the judgments of this Ccurt which have just been flaunted in the state court action. It was simply a re-litigation of a matter that had been litigated before this Court on the matter of the reasonableness of the sale. It was one . . . It had to be one of the primary bases for the award of any damages to the Trustee in Bankruptcy. Your Honor, in your judgment and finding of facts, which was summarized in our Complaint, found that there had been a waiver of notice, et cetera, by Parsons in connection with that sale. This, of course, was re-litigated in the state action.

So, it is a . . . If this injunction does not issue, then the protection of res judicata and collateral estoppel is simply gone, and we will be subjected to the enormous burden now of fighting off a levy of the four million dollar judgment — or, the attempted levy of it — of having **[28]** an expensive appeal and having to defend another one hundred nineteen million dollar lawsuit, all arising out of matters that were fully litigated or which could have been fully litigated in this Court. And I earnestly urge this Court to grant the injunctive relief and nullify the conflicting state court judgments which have not only undermined but torpedoed this Court's judgment which has been upheld by the Eleventh Circuit.

Let me also say in terms of chronology where we were in the state court as far as Your Honor's judgment is concerned.

While it was on appeal to the Eleventh Circuit, it was obviously not a matter of complete certainty whether Your Honor would be affirmed or reversed. The judgment affirming . . . the judgment of the Eleventh Circuit affirming Your Honor came down in June of 1982. And an application for rehearing was then filed by the Parsons and that was denied in August of 1982. As Your Honor knows, there is a period of ninety days within which certioari could have been sought in the Supreme Court of the United States. So, that period ended in late November, 1982.

Obviously, not only considerations of comity and an attempt to exhaust available legal remedies dictated that we raise these matters in the state court, but had Your Honor's judgment not stood, then we would have really [29] had a case of waiver in the state court for not having raised it. We raised it — there is no question — over and over again in the state court and we gave the state court every chance in the world to rule on this thing and rule correctly, but it didn't. And it is now, as I began saying, necessary for this Court to give us some injunctive relief.

Thank you.

THE COURT: Let me ask you a couple of questions before you sit down.

As to the applicability of the doctrine of res judicata as it may bear on your being estopped to raise it at this point. What is the purpose of the doctrine of res judicata?

MR. NACHMA'[illegible]: To prevent the disruptive burden of re-litigating matters which have been re-litigated or which could have been litigated in a prior action, and to avoid unfairness and waste of judicial time and waste of clients' time, and . . . just that re-litigation is a burden which shouldn't be tolerated in a judicial system..

THE COURT: In view of the fact that it is, at least partially, the burden on courts that is sought to be protected, I question that a party has a right to waive it or be estopped by continuing in the litigation.

I could see the contention of the Plaintiff that [30] you continued to litigate and you put them to a lot of expense without bringing this matter to this Court initially. On the other hand, I suppose . . . I know these lawyers — Plaintiffs in the state court — and I know that they were making every effort to state different causes of action to avoid res judicata or collateral estoppel in that matter, and it may very well have been — and I make this comment for all of you to answer, if you wish — it may very well have been that it was very difficult to explain to the state court at that point that the res judicata or collateral estoppel would apply.

Is that or is that not so?

MR. NACHMAN: That, I don't believe, is correct, Your Honor. I don't think the . . . The Defendants here can speak for themselves.

I don't think they are saying that we waive the res judicata defense in the state court. I think what they are saying —

THE COURT: — waived the right to come back here with it.

MR. NACHMAN: That is what they are saying, Your Honor.

THE COURT: — at this stage.

MR. NACHMAN: As I began . . . Let me read it, if the [31] Court will permit me, from Section 4226 of Wright and Miller: A party seeking an injunction . . . We are talking about —

THE COURT: Did you cite that in your brief? You haven't gotten around to briefing that point, have you?

MR. NACHMAN: No, sir. But it is cited in the cases . . . some of the cases that we have cited.

THE COURT: Well, give me that cite again.

MR. NACHMAN: Section 4226 of Wright and Miller.

THE COURT: All right.

MR. NACHMAN: The discussion thus far has been concerned with when the federal court, by virtue of the third exception to 2283 — and to interpolate, that is this re-litigation section we are talking about — has power to stay proceedings in a state court. The mere existence of power does not mean that this power is to be exercised as a matter of routine. A party seeking an injunction must always satisfy the usual, equitable test for an injunction of irreparable injury and absence of an adequate remedy at law.

And what we are saying, Your Honor, is if we hadn't tried to get the state courts to rule correctly on this question of res judicata or collateral estoppel, if we had come right after this Court . . . let's just say, right after this Court issued its judgment n.o.v., if we had come **[32]** immediately to this Court and said, Your Honor, there is a state court case pending that is just like this one and it barred by res judicata or collateral estoppel, please, Your Honor, issue an injunction. I think these parties would have said and I think Your Honor may well have said to us, "Well, look. You haven't given the state courts an opportunity to rule on that question yet. You haven't shown me that there is no adequate remedy at law. You haven't shown me it is necessary for this Court to issue an injunction to protect or effectuate its judgment because, if the state court holds with you on your res judicata and collateral estoppel defense, then my judgment will have been protected and effectuated and it will not be necessary for me to enjoin the state court proceeding." So, what we say is, it was necessary for us to pursue those defenses in the state courts as far as we could pursue them

before coming here. And had we not done so, as I say, we would have been met at the threshold here with, "Why didn't you do so?"

But, Your Honor, we submit it is absolutely correct that at some point the judicial system is involved, and Your Honor, as the representative of the judicial system, is not to be waived or estopped from saying, "it is now necessary for me to issue this injunction to protect my earlier judgment and to protect my jurisdiction." And [33] this is what Judge Guin did in the Bank of Heflin case.

THE COURT: All right, sir.

MR. WILSON: May it please the Court, as Mr. Nachman stated, we are dealing with an equitable remedy, an extraordinary remedy. And in this case, not only that, but we are dealing with a request that this Court intercede in the proceedings of a state court, which I would characterize as the most extraordinary remedy you can ask a federal court for.

So, with that idea in mind of where we start today, I want to go back and talk about some of the things that Mr. Nachman talked about.

On the question of waiver or estoppel: It is not the fact that he has argued res judicata in the state court that we say means he has waived and estopped it. It is our position that it is these Plaintiffs that are relitigating. They have made a strategical decision that they were going to state court and attempt to pursue the litigation. In that state court litigation, not only have they defended our Complaint, they have asserted a counterclaim, they have asserted a third party complaint and sued Mr. Orange and O.S.I. They have fully gone through litigation and availed themselves of the jurisdiction of that state court for discovery, for their counterclaim, for their cross-claim, and now that they were not able to [34] persuade that court and jury that they should prevail — they raised a number of other defenses as well as res judicata. They said that Mr. Parsons consented, they

said that Mr. Parsons waived, they denied having . . . denied any wrongdoing. Now, after putting the state court through a nine day trial, they come back to Your Honor and say, "Well, we are dissatisfied with the rulings we have gotten in state court, and we want Your Honor to act as an appellate court for the state court, and reverse their decision," essentially.

THE COURT: In other words, both sides now are claiming that the other side is dissatisfied with an earlier judgment in court and has gone into another court and tried to change it?

MR. WILSON: That is exactly right, except, of course, we deny we have done that. And I am going to get to that point in a minute.

But as far as the estoppel, this is an equitable remedy that they seek. You have to do equity to get equity. You have got to have clean hands. The normal equitable principles apply here.

I cannot imagine anything more inequitable than to let these Defendants wait back and see: "We are going to wait and see how we come out. We are going to go through twenty months of litigation. We are going to [35] fight them tooth and toenail, we are going to raise every defense available to us" — which, of course, they have a right to do and should do — "we are going to put witnesses on the witness stand, take up nine days of court time, we are going to put witnesses on the witness stand, we are going to deny what they say occurred occurred." Then after we . . . "and we are going to sue someone else — "

THE COURT: Sounds like you are the pot calling the kettle black. You did the same thing.

MR. WILSON: No, sir, we did not do the same thing.

THE COURT: Well, you are accused of doing the same thing.

Go ahead.

You waited until you saw how you came out in federal court—

MR. WILSON: No, sir.

THE COURT: — dissatisfied.

MR. WILSON: No, sir. The state court action was filed in February of 1979 and was pending four months before the federal action was ever filed.

THE COURT: Did anybody call that to my attention when I was trying to get to the federal action?

MR. WILSON: No, sir.

THE COURT: That is interesting.

Go ahead.

[36] MR. WILSON: And that is another point that we make: If they were the same cause of action, it appears that the Defendants would have brought that to your attention at the same time. But clearly they were not, Judge.

Let's go back and review that federal court action. There are two points that we make.

There is no dispute that you can't relitigate issues that were already determined in the federal court. Mr. Nachman has got a number of cases to that, and we don't dispute it. In fact, Heflin is a good example, and I am going to get to that in a minute — totally different from the situation here, but a good example.

In the federal court lawsuit, we alleged that under the Bank Holding Company Act, which is 12 USC 1972, that by demanding that Mr. Parsons take in Mr. Orange as manager and stockholder, they violated that Act. If Your Honor will remember, at that point, it had never reached the Court of Appeals in this circuit but one time and that was on a motion for judgment on the pleadings. The defendants in that case, on at

least . . . I recall at least five different times we came here and argued before Your Honor, and they said you had no jurisdiction of the federal complaint; that the things we allege did not constitute a violation of the Bank Holding Company Act. After the trial, Your Honor determined the same thing; [37] that the requirement did not meet the . . . was not a violation of the Bank Holding Company Act. And, indeed, in the Eleventh Circuit opinion they said that while this might be a "unusual transaction" — you remember that was the definition that gave us trouble in that action — "it was not a tying arrangement to fit within the Bank Holding Company Act because they did not tie the loan to another service from the bank." Mr. Orange was merely brought in to increase the security on the credit because they were comfortable with him.

Now, in the face of their five or six motions, continuous argument to this Court that you had no jurisdiction of this federal complaint, they tell you that we should have dismissed a pending state proceeding and tried to pendent those claims with the federal claims that were in this court at that point. And even if that is not absurd enough, they say not only should we have brought some additional claims against the bank, but we should have brought in another plaintiff and two . . . three more defendants into federal court. When they were arguing every day and we were before Your Honor six or seven times to question whether or not you had any jurisdiction of the federal complaint itself.

This brings us to an analysis of the Gibbs' decision; pendent jurisdiction. In there the question . . . [38] Of course, the immediate inquiry is whether it arises out of a nucleus of operative facts. There are three other exceptions that Gibbs talks about. First: Do the state claims overwhelm the federal claim? Second: Is there . . . Would there be an opportunity for confusion with the jury if you tried them all together?

THE COURT: Well, if there had been an opportunity to confuse the jury, it would be in your favor, wouldn't it?

MR. WILSON: No, sir. The action we brought in federal court was . . . and I want to point out one thing that I did not bring out.

Your Honor had so much doubt about whether or not the actions that we asserted were actually a violation of the Bank Holding Company Act, that you ordered the bifurcation of the trial, to try it on liability first to see if the actions we complained of would in fact prove to be a violation of the Bank Holding Company Act before we went to the additional expense of discovery and trial of the second point.

The issue in federal court was a very narrow and simple one: Was there a violation of a specific, narrowly construed statute in federal court?

THE COURT: That was based on a pleading that you filed.

MR. WILSON: Yes, sir, that is exactly right.

[39] THE COURT: Go ahead.

In the state court, we have got four plaintiffs and four defendants. We have got one plaintiff and three defendants that are not even parties to the federal court. We have claims of commercially reasonable sale which occurred a long time after the violation of the Bank Holding Company Act which we alleged occurred.

THE COURT: Now, wasn't that proved or wasn't . . . Wasn't that proved in the damages you claimed against the bank?

MR. WILSON: Your Honor, we never got to the damage stage in the federal court lawsuit, as I remember.

THE COURT: I seem to have some recollection about that. I don't know what stage it came up in. It may have been in the part where we were talking about whether or not we should bifurcate the case. I am sure I didn't just bifurcate it in the dark. I talked to you gentlemen about it.

MR. WILSON: Yes, sir.

THE COURT: And I did have a question about whether you had a cause of action and I did think it would be foolish for the parties to have to pay for litigating the damages question if there were no liability question.

MR. WILSON: And it ultimately —

THE COURT: But I also talk about what damages you [40] were interested in, I think, and that is where I got into my head that you were claiming damages for the way the sale was operated, as a result of the Bank Hold Act violation, as I recall your claim.

MR. WILSON: Well, Your Honor, let me say this additionally.

We were not the parties who owned the collateral that the bank sold. That was the Trustee. Any damages we might have would not have flowed from that aspect of the case because under UCC they were the ones who would assert the damages for commercially unreasonable sale, is the person who owns the assets. And, of course, here . . . As I recall the damage we sought, it was essentially to Mr. Parsons' business reputation, based on the actions that Mr. Orange did after he got in there.

THE COURT: All right. Go ahead.

MR. WILSON: Under the Aldinger versus Howard decision the Court, the Supreme Court, specifically states that there is a great distinction between pendent jurisdiction — that is, bringing in several claims against a defendant that this Court has jurisdiction of — and bringing in other defendants. And the basis of this is that the federal courts are courts of limited jurisdiction. When you attempt to assert what is termed pendent party jurisdiction, you are attempting to bring in people who, ad- [41] mittedly, there is no independent claim of federal jurisdiction against. And that is essentially what Mr. Nachman says now, although he said the Court didn't have any jurisdiction of

the federal claim at that time. He says now, we should have attempted to bring in these other parties.

I would submit to the Court that he has now asserted a cross-claim against Michael Orange and O.S.I. He could have brought them into the federal litigation as well as the plaintiff could have, assuming that he has a cross-claim to assert.

THE COURT: Well, if the bank is charged with a violation of the Bank Holding Company Act, I don't understand how the bank could counterclaim for damages that they caused under the Bank Holding Company violation against anybody. They are the ones that violated the Bank Holding Company Act.

I don't follow your argument.

MR. WILSON: Your Honor, that is my argument. They are the ones who violated the Bank Holding Company Act —

THE COURT: Well, you are trying to say they are just as guilty as you were for not bringing Orange and O.S.I. into the federal litigation. But I can't buy that because they couldn't have brought them in under the Bank Holding Company Act claim.

MR. WILSON: Your Honor —

[42] THE COURT: They are the only ones liable for that. Somebody else wouldn't be liable.

MR. WILSON: That is exactly my point. I couldn't have brought them in either under the Bank Holding Company Act because the bank is the only party that could be liable under the Bank Holding Company Act.

THE COURT: You can bring in a joint tortfeasor who contributes to your damages. And that is what you are now really contending; that Orange and the bank were joint tortfeasors proximately causing your injuries or damages, aren't you?

MR. WILSON: Yes, sir, for the causes of action that we asserted in state court they were certainly joint tortfeasors. That is the point. There has got to be some federal jurisdiction to bring those other parties in. That is the reason why it was necessary in this case that there be two causes of action.

THE COURT: Not if it all arises out of the same series of transactions.

MR. WILSON: That is the Aldinger versus Howard case, Your Honor. That there are — When you talk about bringing in a number of counts against one defendant who this Court has got jurisdiction of, you are talking about one thing. When you are talking about bringing in parties that this Court does not have jurisdiction of, **[43]** then you are talking about entirely another. And there is substantial doubt whether or not the Court has power to bring in other parties that it does not have any independent ground of jurisdiction on. And that is the holding in the Supreme Court case of Aldinger versus Howard.

As Your Honor mentioned in a question to counsel for the Plaintiffs here, the whole purpose of res judicata is to avoid unnecessary litigation, duplicative litigation, and to conserve what is recognized to be precious judicial resources. That is the basis for our argument to Your Honor that these parties cannot wait and take a chance on how they will come out in the state court, put that court . . . if they have got a basis for this injunction, which we submit they do not, they can't now wait and see. If they had gotten a verdict for the Defendant in the state court action, certainly they would not be here before Your Honor. They have taken their tactical choice to go before the state court, to assert their counter-claims, cross-claims, litigate that matter fully, and they now come back and say that res judicata, whose policy is to avoid unnecessary trials, requires that Your Honor enjoin the state court litigation.

I cannot imagine a greater intrusion or affront on comity than what they are asking you to do. We have had arguments before

two state court judges concerning this **[44]** issue of res judicata. The plaintiffs have been fully able to argue —

THE COURT: Who were the two? I didn't know that.

MR. WILSON: Yes, sir. The state case was assigned first to Judge William Gordon. Later he found it necessary to recuse himself and another circuit judge took the case over — Judge Sam Taylor. When he did, the bank went through the same motions for summary judgment, went through an entire argument of the same situation again.

THE COURT: I see.

MR. WILSON: Now they are saying . . . They have the opportunity to present that same defense to the Alabama Supreme Court, but they are asking this Court to virtually slap the face of those state court judges and the jury that heard this lawsuit and, indeed, the Alabama Supreme Court. Because what they want you to say is that the courts of Alabama are not . . . do not have the ability to hear their defenses and, therefore, they have got to come back to this Court to ask Your Honor to reverse what the state court has done.

In the Bank of Heflin versus Miles case, it is true that eventually the court enjoined a decision of the Alabama State Supreme Court. But if you look at the case of Miles, it is a totally different situation. Here they **[45]** are saying that these claims we brought, could have, and should have, are barred by res judicata; not that we had the opportunity to adjudicate them but that we could have.

In the Bank of Heflin case, you have got, on the one hand a state court order saying, "Turn over FDIC records," On the other hand, you have got a federal court order saying, "Do not turn over FDIC records because federal law prohibits their disclosure." You have got a direct confrontation of two orders. It was clear that the Court in that case, in order to protect its judgment, had to grant relief that was sought. In this case, Your

Honor's judgment was merely on the Bank Holding Company claim, There was no judgment on the merits on any other issue; on any of the issues raised in the state court. At this point, there is no state court judgment which directly confronts the decision that Your Honor made. And that is a great distinction.

We would submit to Your Honor, that it would be an abuse of discretion to interfere in state court . . . in an on-going state court proceeding under the circumstances of this case.

THE COURT: Well, let me ask you a question or two before you sit down.

In the federal court proceedings, we wound up with one cause of action; a violation of the Holding Company [46] Act, as I understand it. Is that right?

MR. WILSON: Yes, sir.

THE COURT: Now, what causes of action did you have in state court?

MR. WILSON: All right, sir. We had a cause of action for fraud —

THE COURT: Against whom?

MR. WILSON: Against Mr. Herbert and against the bank.

THE COURT: And those . . . The circumstances for supporting that fraud were the same circumstances, were they not? Or were they?

MR. WILSON: No, sir, Your Honor. I think it is —

THE COURT: That you insisted supported the Bank Holding Company Act?

MR. WILSON: Your Honor, I think it is important that Your Honor understand the content . . . that is why I put into evidence this morning the contentions of the Plaintiffs and the Defendants in the state court lawsuit.

THE COURT: I understand that. But I am asking you what the difference is. I don't know.

MR. WILSON: All right, sir. The fraud alleged in the state court lawsuit included employees of the bank, other than Mr. Herbert, began in January of 1978 with promises of additional loans, including . . . went into **[47]** September of 1978 with additional loans and went right up through the Bank Holding Company violation.

THE COURT: Well, now, wherein did you contend that you had any consideration for those promises?

MR. WILSON: It was not a contractual . . . The allegation was that at the time they made the promises, they had no intention to perform them; therefore a violation under — I believe it is, 6-5-105 of the Alabama Fraud sections. It was a promise made with no intention to perform —

THE COURT: That would be a binding promise?

MR. WILSON: No, sir. It is not a contractual type . . . We did not assert a contractual claim and there would be no necessity of any consideration for it. There would have to be some damage to the person having relied on those promises, certainly, yes. And the damage was that he continued his relationship with the bank, did not attempt to get any outside financing, and put more money into the Montgomery corporation and did not sell off the inventory — things of this type — relying on the promise of additional loans.

Then there is another cause of action arising out of Mr. Orange's relationship with the subsidiary which . . . Well, the Parsons-Montgomery. A breach of fiduciary duty which, of course, an officer of a corporation has to the **[48]** corporation and shareholders.

It was alleged that because of the relationship involved, the bank had a fiduciary duty to the corporation and shareholders as well.

Then, the additional causes of action arose in January when the assets were repossessed and sold under the Uniform Commercial Code.

So, essentially, you had claims of fraud which arose out of different circumstances than the Bank Holding Company Act, you had a claim for fraud against Mr. Orange, and you had the UCC violation, and the breach of fiduciary duty of the corporation, as well.

Your Honor, I think that is important. If . . . Let me see if I can find the case.

In this Wood exploration case which Mr. Nachman cites, res judicata bars litigation . . . you know, what is a cause of action? That gets down to the bottom line question: What is a cause of action? That case sets out the test for a cause of action which says that causes of action are the same when the wrong alleged is based on the same conduct by the defendants. And that is why this case, we say, that it is not the same cause of action because it is not based on the same conduct of the defendant. There is differing conduct upon which the wrong is based: The Bank Holding Company Act on the one hand, and the broad, [49] Uniform Commercial Code, violation of fiduciary duties on the other hand in the state court action.

THE COURT: Well, you get mighty close to a situation where a man is driving an automobile and runs a red light and runs over somebody and you sue him alleging that his negligence was running the red light and you lose. And then you come back and you sue him alleging that his negligence was not looking up the road to be sure the road was clear and you win.

Now, you have got two different things that you say amount to negligence, yet they all are connected with the same transaction.

I understand that this is a bigger, wider, situation but it is thing that bothers me about this situation. How far can you go

with it? The damages you insisted on, they way you were hurt, all arose from the conglomerate of these things, as I understood the prior lawsuit. You stated a cause of action in one way in the federal case, and then you came back and stated a different cause of action in the state case.

Can you educate me a little on that matter?

MR. WILSON: Your Honor, I think the example you have given is an excellent one. That would clearly be res judicata in that instance. You have got one car wreck, one action . . . one piece of conduct by the defendant. **[50]** You are merely asserting different theories of relief for the same cause of action for the same conduct: He ran the red . . . Well, he hit your car. You claim he is negligent; he ran the red light. He is negligent because . . . Well, for whatever other reason — he was speeding. Whatever reason you want to give.

In this case, you have got different conduct complained of. The Bank Holding Company Act violation, as the Swardlow case and cases under that section hold, if it occurred — of course, the ultimate decision was that it did not occur — if it occurred, it occurred at the moment that they made the illegal requirement.

Let's assume a case that would definitely be a violation of the Bank Holding Company Act. If you want this loan, you have got to send all your paper . . . a car dealer; you have got to send all your paper back to our bank. That would definitely be a violation. A violation occurred right there. That is conduct upon which the Bank Holding Company Act cause of action would be based. In this instance . . . And it was based on one . . . In our case, it was based on one meeting between representatives of Parsons and the bank at which alleged illegal requirement was made.

The state court action is based on differing conduct, conduct of different people including Mr. Bill Richard- **[51]** son, who

was an employee of the bank; alleged a cause of action based on promises and conduct that he performed —

THE COURT: Well, you sought to hold the bank, in the case you tried here, partially on the statements of Mr. Richardson, as I recall it. It was integral part of the trial of the case in the federal court.

MR. WILSON: Your Honor, I believe that the —

THE COURT: I have forgotten all the details.

MR. WILSON: The significance of Mr. Richardson's testimony . . . If you will remember, the bank said in the Holding Company action, not only did we not condition a loan on an illegal requirement, but we told you we weren't going to give you any more loans because your company was in horrible shape. And the testimony of Mr. Richardson went to the question of whether or not in fact the company was in horrible shape, in that he never put anything in the records to show it. That was what we showed through Mr. Richardson. I believe he was called as a witness for the defendants.

As Your Honor made clear in his opinion on the j.n.o.v., — and was not disputed by us — we were not claiming anything Mr. Richardson did as a violation of the Bank Holding Company Act. I think that is clear in our contentions in the pre-trial order and Your Honor discussed that in your j.n.o.v. opinion.

[52] So, I believe that while Mr. Richardson's testimony — your recollection is correct. It was important to the case — there was no claim that anything he did was a violation of the Bank Holding Company Act, nor did we seek recovery for any conduct of his that we claim was any wrongdoing.

THE COURT: All right.

MR. WOOD: Judge Varner, on behalf of the Trustee, this is an Act case, as far as the Trustee is concerned, under the old bankruptcy act.

There were four lawyers appointed for the Trustee at various times during the case. The U.S. Bankruptcy Court here on April the 5th, 1979, determined that Parsons was an involuntary bankrupt and they appointed a lawyer named Farley Moody, they subsequently appointed Jere Beasley — each of these lawyers getting out in turn — George Azar was appointed, and finally I believe along about November of 1979, almost ten months after the state court action was filed, I was appointed to represent the Trustee.

It was the lawyer for the bank who insisted that the Trustee be involved in the state court proceeding. In fact, Your Honor has exhibits 1 and 2 where bank and Herbert used this language: We can't have complete relief unless the Trustee in Bankruptcy, A. Pope Gordon, is added **[53]** to the suit. He claims an interest in it and the bank will be subject to multiple claims if he is not added.

So, we —

THE COURT: Well, you agree with me, don't you, and with him, that a corporation, not a stockholder of the corporation, is damaged by an act against the corporation?

MR. WOOD: That is the law.

THE COURT: And the corporation, not the stockholder, should bring the suit?

MR. WOOD: That is the law.

THE COURT: Now, this suit . . . The water is muddied by the facts that this suit was brought and the damages to the corporation were confused with the damages to the stockholders of the corporation.

MR. WOOD: I dont' believe we have that confusion.

THE COURT: Well, I have a great deal of confusion about it, and still find it quite confusing.

But, go ahead.

MR. WOOD: If Your Honor please, Mr. Nachman —

THE COURT: What I am saying is, that you should have been in it.

MR. WOOD: Well, sir, let's talk about that a minute, Your Honor, because that is the point I want to make.

[54] It was Rod Nachman, the attorney for the bank and the bank and Herbert, who insisted the Trustee be added. And since this was an Act case, it took leave of this Court through its bankruptcy arm for us to pursue that litigation, which was granted. Subsequently, in discussing this with Mr. Nachman — and as an officer of the court, I just tell you this — we were told that this is a very narrow action. This Bank Holding Company action would be a waste of your time and effort, and you shouldn't belong over there. You don't belong over there. We never —

THE COURT: Belong over where?

MR. WOOD: In this court in the Bank Holding Company action.

THE COURT: All right.

MR. WOOD: This lawyer.

I am not saying that strategically he couldn't tell me that, but that was the posture then. The posture now is, "Well, you didn't come over there, so you are out and you are barred."

The bottom line is that, as this Court in exercising its equitable powers looks at this, the bank comes with unclean hands. It does come with unclean hands. They say, "They should have been asked to be added over here." They insisted that we be added over there, put us to the expense of nine days of trial plus months and months and **[55]** months of depositions and preparation, and they tried to say, "Well, we won over in

federal court and you are estopped or you are subject to the rules of res judicata."

Your Honor never saw Count 9 of our Complaint. It is not outlined side by side, but it is before you. I ask you, as you look at those exhibits, to look at the Trustee's cause of action. It is not identical to these folks'. Beasley was not our laboring oar, nor Wilson nor Parsons. The bankruptcy court had already determined that Mr. Beasley could not represent Trustee's interest. He had been their lawyer. It is true we had to use some of the same witnesses because, as Your Honor knows, the witnesses generally are a limited group of people who know what something is about.

The bank comes and asks, Judge Varner, pull our chestnuts out of the fire. We tried over there and we lost." But we were not a party to this federal action. It was a very narrow Bank Holding Company action, as Your Honor knows.

If Parsons did all the things Your Honor said in your order and the Eleventh Circuit agreed with you that he did, but assuming he waived everything, that he did all those things that you found, the Trustee in Bankruptcy, on behalf of the unsecured creditors, would still have a right to insist on a commercially reasonable sale of those **[56]** assets. Our Count 9 asks for that. A jury of twelve people in state court said we are entitled to two million dollars in a general verdict based on that.

Your Honor, we have never had but one bite at the apple, and that was over in state court.

THE COURT: Were you in bankruptcy at the time this suit was originally filed in federal court?

MR. WOOD: No, this suit . . . Yes, sir, we were. Yes, sir.

THE COURT: Do you agree with that?

MR. NACHMAN: Yes, sir.

MR. WILSON: Yes, sir.

THE COURT: All right.

MR. WOOD: But the state court suit was originally filed in February, '79. It was not until April, '79 that the bankruptcy . . . That is an involuntary bankruptcy that Parsons-Montgomery —

THE COURT: Well, I was just wondering why the Bankruptcy Court didn't supervise the sale of assets.

MR. WOOD: The sale had already taken place in January of '79. The bank foreclosed and sold it in January, '79. The involuntary bankruptcy petition was not granted until April of '79.

THE COURT: Well, obviously the Trustee didn't have a right to participate in the sale if there wasn't [57] a Trustee.

MR. WOOD: If it were commercially unreasonable, the Trustee has a right to look back and insist that the bank pay over any value over and above . . . what those assets were worth over and above what they got. And this is what we did in state court. The jury determined we were entitled to two million dollars more than the bank got.

THE COURT: All right.

MR. WOOD: Now, Judge Varner, we have given you a brief. We tell you that we don't believe, under the cases cited, that pendent party jurisdiction was appropriate to this cause of action. You have heard from Mr. Nachman and Mr. Wilson. We cite the Aldinger case, we cite the history of that. We simply say to you that, you know, with twenty-twenty hindsight, a lawyer for the bank comes and says Your Honor would have added these if he had been asked. The record over here in the Bank Holding Company Act is replete, as Mr. Wilson has pointed out, with instances where he was insisting that nobody had a right to be here. And certainly, I think Your Honor . . . If you

would look at Rule 24, you wouldn't have added the Trustee or any of these other folks. That is not a decision you have to make. We just say that pendent party jurisdiction is not appropriate; certainly not [58] against the Trustee.

We were not in privity with the Plaintiffs in the federal action. Mr. Nachman would have you believe that. The federal action that was before Your Honor sought damages for the stockholders of Parsons Steel Industries; not the unsecured creditors of the bankrupt estate.

We were separately representing the Trustee in the state court action, we sought leave to participate over there. Because of the narrow basis for your jurisdiction, we didn't intervene nor try to junk up the federal lawsuit, and we don't think it is res judicata for us. We don't think we could have intervened.

THE COURT: Did some of the obligations of your corporation . . . Were they not endorsed by Mr. or Mrs. Parsons?

MR. WOOD: As far as to the First Alabama Bank, the secured obligations were endorsed. The unsecured creditors I am representing, Your Honor, were mostly open account people like United States Steel and others who had furnished steel and other goods to the company. You know, thirty, sixty, ninety day accounts.

THE COURT: There was at least some privity between the businesses of the Parsons individuals with the businesses of Parsons-Montgomery at that time, then?

MR. WOOD: Well, as Your Honor pointed out to me [59] a while ago — and I agree with Your Honor and certainly with Mr. Nachman — the corporation has the right to pursue the interest that we are talking about. And this corporation, this bankrupt estate, was not in privity with these persons who were over here before you on the Bank Holding Company Act. And that is my point.

THE COURT: If they were liable on the same obligations, it seems to me they were in privity.

MR. WOOD: No, sir, they weren't liable. These were corporate obligations. Parsons had —

THE COURT: But Parsons were liable on some of those corporate obligations, I think.

MR. WOOD: Not on the people I represent. No, sir. They were corporate obligations. He was . . . To my knowledge, there are eight hundred thousand dollars worth of them, plus or minus. But he, to my knowledge, was not giving a limited guarantee or unlimited guarantee or any kind of guarantee to any of these businesses from whom the corporation Parsons-Montgomery bought steel.

Your Honor, there is just simply no basis for applying res judicata or collateral estoppel against this Trustee. As I pointed out, Mr. Nachman comes seeking equitable relief. The bank simply is not entitled to it.

He would have Your Honor look at the portions he has outlined side by side. He conveniently leaves out out **[60]** Complaint, our amended Complaint, in that analysis. We have not had, as I pointed out to Your Honor earlier, but one day in court. And he would seek to have Your Honor take away a fairly won judgment over there, and deny us any bite at the apple.

THE COURT: Now, how did that judgment go over there? Was it a judgment for the Trustee, or was it a judgment for the Parsons, or was it a judgment for Parsons of Mobile, or . . .

MR. WOOD: Let me give it to Your Honor this way: There was a two million dollar judgment for A. Pope Gordon as Trustee. There was a one million dollar judgment for Jim Parsons. There was a one million dollar judgment for Melba Parsons. And there was a one dollar judgment for Parsons, Mobile.

THE COURT: All right.

MR. WOOD: You know, we were there throughout, Your Honor, from November of '79 on. I don't know of any basis . . . As I say, we have given Your Honor in brief the applicable law. I don't know of any basis for this Court to enjoin, exercising its equitable powers, the state court judgment or any proceeding over there as regards this Trustee. We simply haven't been before Your Honor.

As Your Honor recognized a while ago, you did have a bifurcated trial. I was not here, but it is my understand- **[61]** ing that you never got to any damages question. You heard some testimony about the tying arrangement and the basis for the jurisdiction under the Bank Holding Company Act. We heard nine days of testimony . . . eight days of testimony and one day of jury verdict on all aspects of the case; particularly the commercial unreasonableness aspect that the Trustee owned.

We say there is simply no basis for it. Mr. Nachman asks this Court to do something extraordinary when there is no basis for it. His hands are not clean, and he is not entitled to that relief.

MR. NACHMAN: May I respond, Your Honor?

THE COURT: Yes, sir, certainly.

MR. NACHMAN: May it please the Court, I will begin where Mr. Wood ended and take care of the trustees in a hurry.

He stated that he got two million dollars because the sale of assets was commercially unreasonable, and that in my side by side comparison in the exhibit, that is not there. Let me read from page 7 of Exhibit A which is the side-by-side comparison which quotes paragraph 27 of the federal Complaint; the Complaint that was filed before Your Honor.

"The sale of the assets of the subsidiary" — that is, his company; Parsons-Montgomery — "by Defendant O.S.I., **[62]** Incorporated, a corporation newly created in January, 1979, for

the sole purpose of obtaining the assets and properties of the subsidiary, was not handled in a commercially reasonable manner, in that the acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by O.S.I. being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms who could have been purchasers were given an opportunity to inspect the property and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof." That is the federal Complaint, Your Honor. That is the complaint that began here and ended here with a judgment n.o.v. which dismissed it.

THE COURT: What paragraph is that?

MR. NACHMAN: Paragraph 27 of the federal Complaint. It is quoted . . . Well, the whole Complaint is in evidence, and attached, but it is on page 7, sir, of our side-by-side comparison of the state and federal complaints.

As far as privity is concerned, we don't rely entirely on privity, but I call the Court's attention again to the Southwest Airlines case, the Fifth Circuit case at 546 at page 95, which recites several circumstances in [63] which a party can be bound even though he was not a party to the other action. And one of them is where a parent corporation controls a subsidiary. And there are others that are listed there; trustee represents the interest of the beneficiary, the state can represent the interest of a home-ruled county, the United States government — as I pointed out — was bound by actions of which it was not a party where the party was a public contractor which was resisting the tax.

So, the question, Your Honor, that these lawyers keep avoiding, and in response to questions from the bench, it is not what was actually brought here. It is not whether these plaintiffs

. . . we didn't come into the federal court. We were defendants in this court. We didn't come into the state court. We were defendants in the state court. And the question is not what they actually brought before this Court for decision, but what they could have brought before this Court for decision.

Your Honor asked Mr. Wilson what else was involved. We talked about commercial reasonableness. He mentioned fraud and breach of fiduciary duty.

Well, we have cited on page 13 of our brief three bank holding company cases — Tose against First Pennsylvania Bank . . . all three of these were cited by the Eleventh Circuit when it upheld Your Honor's judgment. In Tose, **[64]** state claims for intentional interference with business under state law were brought along with a complaint in the Bank Holding Company Act. In Duryea against the Third Northwestern National Bank of Minneapolis, state anti-trust law, common law fraud, unjust enrichment, and state blue sky law violations were all alleged in connection with and part of a Bank Holding Company Act case. In Clark against United Bank of Denver, Tenth Circuit case, Bank Holding Company complaint, breach of fiduciary duties, fraud, unfair competition, and breach of warranty.

And the question is not what they actually brought, but what they could have brought. This is clear in so many of these cases. One of the most recent ones is the Harper case, which is — although it is a Seventh Circuit case, Judge Thomas was one of the three judge panel that sat by designation on that case — and there was a failure to join a breach of contract action under state law with a Robinson-Patman Act claim under federal anti-trust law. And the court said, "In the instant case, the issue of whether there was a breach of contract was more than a mere ancillary matter, it was part of the appellant's cause of action. And by failing to raise the matter in his pleading, appellant has split his claim against the appellees."

And then the court goes on, "The rule against claim splitting is not a new one and the cautious litigant includes **[65]** all relevant theories of relief in a single action to avoid its prejudice. The doctrine of pendent jurisdiction and the broad joinder provisions of the Federal Rules of Civil Procedure provide an appellant with a convenient vehicle for presenting the federal court with its several theories of relief. It may not now argue that it has not had an opportunity to do so."

And Your Honor very correctly points out, and Your Honor's findings of fact substantiate what Your Honor said: "The common nucleus of facts, the facts out of which these several theories of relief, these several causes of action arose, were common ones."

We have attached Your Honor's extensive findings in support of your judgment n.o.v. as one of the exhibits to our Complaint. And we will not go through all of those now.

I don't understand Mr. Wilson's argument about how we precipitated a nine day trial in state court. We tried to resist it. We urged over and over again that the case should be thrown out on exactly the basis that we are urging here; that it would be res judicata. And, indeed — to read a very brief excerpt from the minutes of the state court of January 28, 1983 — we even urged the trial court, in order to avoid this trial, to certify this question of res judicata and collateral estoppel to the **[66]** Supreme Court of Alabama. It declined to do so. We asked for a continuance on that basis. Here is what the entry is: "Hearing on Motion for" — this is January 28, 1983, on the literal eve of trial. That was a Saturday before the case began on a Monday — "Hearing on a Motion for Reconsideration and on request to certify res judicata question to appellate court and for a continuance. Motions denied."

Now, the question here on this independent suit for an injunction is quite different as to where we chose to raise this matter and whether we chose to raise it in state court. As I stated in

my opening argument, of course we raised it in state court. It was one of our defenses in the state court just as . . . And had we not raised it, had we not pursued it, had we come here earlier and asked this Court on the . . . As soon as the Court entered its judgment n.o.v., if we had asked this Court to enjoin the state court action, I think our response would have been, "You haven't exhausted your remedies. You may have an adequate remedy at law in the state courts. Am I to assume that the state court will rule adversely to you on that question when you haven't even tried to get a ruling from the state courts?" And I think Your Honor would have balanced the equities and found at that stage that we were not entitled to an injunction.

[67] So, it is not a question of our waiving something by asserting it in the state court. We had to assert it in the state court, but we also had to assert it in state court defenses other than that. We could no more fractionate our defenses in the state court and rely solely on the res judicata defense than these persons can now say the only cause of action they had to raise was the Bank Holding Company Act in the federal court and that they could go into the state court and raise other causes of action arising out of the same facts. We couldn't do that. We had to pursue all of our defenses, and we did. But we urged the Court over and over again to zero in on this one matter and decide it and certify the question to the Supreme Court of Alabama, and it wouldn't do it. And this is why we say it is now necessary, Your Honor, for some protective action.

As far as discovery is concerned, these lawyers know and it is recited in the preamble to deposition after deposition . . . this discovery started before either case was tried, and there are stipulations that discovery was to be in both cases, state and federal, so they wouldn't have to be duplicated. And I don't know what Mr. Wilson was referring to when he talked about our taking discovery in the state court. The same depositions were taken for both courts.

It is a plain case, Your Honor, of re-litigation [68] and of the burdens on the judicial system and, more than that, the integrity of this Court's judgment and jurisdiction.

As the Donnelin case, a Fifth Circuit case — which, as you know, is binding now on the Eleventh Circuit — was cited in our brief on page 18. These persons sought to come into this court. Nobody made them come in here, they came in here. But when they came in here, they had to assert all causes of actions available to them, and they didn't do it. They just asserted one, and they lost here. This Court found that we were not liable, and then they wanted . . . they litigated the others in the state court. We tried our best to prevent that relitigation, and up to now unsuccessfully. And this is, indeed, why it is necessary for this Court to come in.

Now, of course, we can go to the Supreme Court of Alabama. There is no question about that. But what is involved there? The transcript of a nine day trial, bonds, perhaps, to supersede a four million dollar judgment, and the defense against a one hundred nineteen million dollar lawsuit that was just filed a few days ago. And we say that is a harassment, that is a burden of re-litigation which Section 2283 is designed to prevent, and we urge the Court to grant the injunction.

Thank you.

[69] THE COURT: Do either one of you want to comment any further on whether or not . . . Let's assume I may enjoin the present enforcement of the judgment, and I may do that. I can't see the relationship to the further case; the one hundred and some-odd million dollar case. I think that may involve different situations. I don't know, really, what the cause of action is for trying to force a settlement. I thought all lawyers tried to force a settlement. I certainly encourage them to. But I don't know what is involved in it, but if the actions that you are complaining of arise from attempting to improperly force a settlement of a judgment that was outstanding — if there is duress or something

of the sort or something that gives a cause of action — I question that I could enjoin a suit even though it might have arisen from a judgment that I may find was improperly entered by the state court.

MR. NACHMAN: Our theory, Judge, is that the . . . there are numerous allegations in this new state complaint which assert that this state court judgment was obtained by the Parsons and that . . . I don't quite understand the allegations myself. But they are, that in order to induce a settlement of the state action, that we are seeking to have set aside, this bank in illegal conspiracy with the holding company and Merchants National Bank somehow committed **[70]** some illegal acts which were designed to force a settlement at less than what the judgment in Parsons' favor was.

And to that extent, our argument is that since there never should have been that judgement, that res judicata was a defense and that the re-litigated issue which resulted in a judgment which is improper and illegal and should be set aside, that . . . that there never would have been . . . even this fanciful basis for the state court action never would have existed. That is our theory on it.

THE COURT: I am inclined to think that I can't enjoin that proceeding. The other proceeding, I will have to study your exhibits before deciding about it. I am impressed that it is very close to a res judicata situation.

I am not impressed with your argument about their being estopped to raise the res judicata theory.

This is a situation that can be used, I think, with much force to argue against the bare bones pleadings that have been allowed in state and federal courts of late. If you were required to plead your causes of actions specifically and required to set up your damages specifically, we could look at the Complaints and tell whether it was res judicata. There wouldn't have been the necessity for the trial court to go into all of the things . . . I

mean, [71] the state court to go into all of the things they went into in order to decide, finally, the res judicata question. They decided it one way, and I could possibly decide it another.

I remember never really knowing for sure precisely what the charge was in this case until far along in the case. You tried to incorporate a number of wrongs into a Complaint which might have been wrongs and might not have been wrongs, and it was difficult for me to tell whether or not there was. It used to be that there were certain requirement for pleading a particular cause of action, and if the complaint didn't contain those requirements, that was the end of it and it could be dismissed and later re-instituted if you could meet the various requirements. That is no longer the law, and it makes it necessary, sometimes, to actually try a case before you can determine whether a cause of action has actually been stated initially.

That is awfully expensive, and we have reached the stage where the cost of litigation is depriving a lot of people of entrances into courts. Poor people have free access to the courts, the wealthy can afford it, the middle-of-the-roaders really can't afford many court proceedings any more.

As far as your claim of their having waived or [72] being estopped from coming into this Court now, I should much have rather they came at an earlier stage, but I can well understand their situation. Because you were doing your best to state your claim in state court in a way different from the way you stated it in federal court, and I don't blame you for that, but I know you are ingenious lawyers and I know you can do that, and sometimes you have to go through a large part of the trial to see whether you are talking about the same thing.

In any event, I will consider your evidence and your briefs. I haven't read your briefs, though I think I understand the positions you are in.

If I accept Jerry Wood's argument, you have always got a situation where a bankruptcy takes place and somebody is left out of a lawsuit and the bankruptcy could come back and relitigate it later. I find it a little bit difficult to swallow that. I will look into it.

All right. Is there anything else?

MR. NACHMAN: No, sir. Thank you, Judge.

MR. WILSON: No, sir.

MR. WOOD: No, sir.

THE COURT: All right. Court will be in recess until further ordered.

* * *

THIS IS ALL OF THE TESTIMONY IN THIS HEARING.

P L A I N T I F F S '

EXHIBITS

EXHIBITS WITH COURT FILE

FIRST ALABAMA BANK OF MONTG. & EDWARD HERBERT

VS

PARSONS STEEL, INC., ET AL.

} C I V I
} CAUSE
} 83-V-1

Hon. R.E. Varner, presiding

Re: Hearing on Request for Preliminary Injunction

M.R. Nachman, Jr.

MITTED	DATE OFFERED	DATE IDENTIFIED	NO.	WITNESS	OBJECTIONS	DESCRIPTION
		3-17-83	1			Civil case action summary; Case No. 2-CV-79-17 Circuit Court of Montgomery County
		"	2			Court reporter's INDEX of court trial proceedi
		"	3			List of witnesses who testified in state actio
		"	4			Witness list of pltf. A. Pope Gordon, Trustee Bankruptcy for Parsons Steel Industries, Inc.
		"	5			Witness list of pltf. Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons-Cir.Crt.Mtg.Co
		"	6			Witness list of pltfs. Parsons Steel, Inc., et U.S. Dist.Crt.,MD AL CA# 79-249-N
		"	7			Partial court reporter's transcript of opening statements of attorneys at jury trial.
		"	8			Partial court reporter's transcript of closing statements of attorneys at jury trial
		"	9			Copy of summons and complaint in the Cir. Cour of Montgomery Co., Al., CA # 83-304-T

FILED

MAR 17 1983

CLERK
U.S. DIST. COURT
MIDDLE DIST. OF ALA
CLERK, BY

DEFENDANTS' EXHIBITS

FIRST ALABAMA BANK OF MONTGOMERY, N.A., and EDWARD HERBERT

VS

PARSONS STEEL, INC., ET AL.

CIVIL CAUSE NO. 83-V-181-N

FILED

MAR 17 1983

CLERK U.S. DIST. COURT MIDDLE DIST. OF ALA. BY CLERK

Frank Wilson
Jerry Wood

ADMITTED	DATE OFFERED	DATE IDENTIFIED	NO.	WITNESS	OBJECTIONS	DESCRIPTION
		3-17-83	1			re: Cir. Crt. of Montg. Co., CA CV-79-179-G 1st Ala.'s renewed mot. to dism. amended complain
		"	2			re: Cir. Crt. of Montg. Co., CA CV-79-179-G Ed Herbert's renewed mot. to dism. amended compla
		"	3			re: Cir. Crt. of Montg. Co., CA CV-79-179-G ORDER of Wm. Gordon, dated 12-12-79
		"	4			re: Cir. Crt. 15th Judicial Cir. CV-79-179-G ORDER denying summary judgment 3-17-82
		"	5			re: CV-79-179-G, 1st Ala.'s and Ed Herbert's m/strike or answer to 2nd amendment to complaint
		"	6			re: CV-79-179-G, 1st. Ala. Bank's notice of intent to serve subpoena on non-party
		"	7			re: CV-79-179-G, 1st Ala.'s and Ed Herbert's request for production of documents
		"	8			re: CV-79-179-T ORDER of court on summary judgment, 1-6-83
		"	9			re: CV-79-179-T, Contentions of deft. 1st Ala. Bank and Edward Herbert
		"	10			re: CV 79-179-T, Contentions of Parsons Steel, In Jim D. Parsons and Melba L. Parsons
		"	11			re: CV 79-179-G, Mot. of 1st Ala. Bank & Herbert for reconsideration of mot. for summary judgment
		"	12			re: CV 79-179-G, List of documents for trial on behalf of 1st Ala. Bank and Edward Herbert
		"	13			re: CV 79-179-G, 1st Ala. and Herbert's alternative mot. to reconsider or continue
		"	14			re: CV 79-179-G, 1st Ala. and Herbert's CROSSCLA against OSI, INC. and Michael Orange
		"	15			re: CV 78-179-G, 1st Ala. and Herbert's renewed mot. for summary judgment
		"	16			CA CV 79-179-G, Bank & Herbert's objection to dismissal
		"	17			re: CV 78-179-G, 1st Ala. Bank's 2nd amendment to answer
		"	18			re: CV 78-179-G, Herbert's 2nd amendment to answer

DEFENDANTS'

EXHIBITS

PAGE 2

FIRST ALABAMA BANK OF MONTGOMERY, N.A., and EDWARD HERBERT

VS

PARSONS STEEL, INC., ET AL.

CIVIL CAUSE NO. 83-V-18

FILED

MAR 17 1983

CLERK
U.S. DIST. COURT
MIDDLE DIST. OF ALA
CLERK, BY

ADMITTED	DATE OFFERED	DATE IDENTIFIED	NO.	WITNESS	OBJECTIONS	DESCRIPTION
		3-17-83	19			re: Cir. Crt. of Montg. Co., CV 79-179-G Answer of 1st Ala. Bank of Montgomery
		"	20			re: Cir. Court of Montg. Co., CV 79-179-T ORDER of Sam Taylor, 1-31-83
		"	21			re: Cir. Crt. of Montg. Co., CV 79-179-G Defts.' proposed voir dire of the jury venire
		"	22			re: CV 79-179-T Court's formal minute entry of jury verdict

PLAINTIFF'S EXHIBIT 1

State of Alab... Supreme Cou... Dept. of Coun...

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CIVIL CASE ACTION SUMMARY

Case Number 2-CV-79-179-[illegible]
ID YR Number

IN THE Circuit COURT OF Montgomery COUNTY

ORI 003045 | Case Number 2-CV-79-179-[illegible] (ID YR NUMBER)

Plaintiff's Name	Defendant's Name	Plaintiff's Attorneys
Parsons Steel Industries, Inc., Parsons Steel, Inc., Jim D. Parsons, and Melba L. Parsons; A. Doyle Bearden as Trustee for Parsons Steel Industries, Inc. (1-12-79)	First Alabama Bank of Montgomery, N. A., Edward Herbert, OSI, Inc., and Michael Orange	Jere L. Beasley Tom DeBuys for Trustee in Bankruptcy Defendant's Attorneys Jim Upchurch Alinda Jones Lee - Defts. OSI and Michael Orange M.X. Sachman, Jr. & Eric Rumpf for First Ala. Bank and Edward Herbert Third Party Attorneys

FILING DATE	DATE SVC	EFF
2 1 5 7 9		

CASE TYPE: Damages

AMOUNT: $ 12,384,945,89

JURY: YES X

PLAINT INDIG: YES —

Disposition

Disposition Date

ACTIONS Jan 21, 1983 9:00 AM

Date	
2/15/79	Summons and Complaint Filed and Issued Sheriff Montgomery County for Service on all Defts.
2-15-79	Served Mr. Cox for First Ala Bank, Edward Herbert, OSI Inc and Michael Orange
3-14-79	Motion to Dismiss filed by defts. OSI
3-14-79	Motion to Dismiss filed by Michael Orange
3-15-79	Motion to Dismiss filed by defts Edward Herbert Motion to Dismiss filed by First Ala Bank
3-16-79	Order setting hearing on Motion at 1:00 p.m. on March 23, 1979
3-22-79	Order setting hearing on motion on April 10, 79 at 8:30 A.M.
3-29-79	Motion for Production of Documents directed to First Ala. Bank of Montgomery and Edward Herbert filed by pltf.
3-29-79	Motion for Production of Documents directed to defts. OSI and Michael Orange filed by pltf.

COURT RECORD (White)

Date	ACTIONS
4-9-79	Motion to produce under Rule 34, Alabama Rules of Civil Procedure filed.
✓	Motion to shorten time filed.
4-20-79	Response to motion for Production of Documents of Defts First Alabama Bank of Montgomery, N.A., and Herbert filed
4-26-79	Amendment to Complaint filed
5-2-79	Motion to Dismiss amended complaint of deft. Herbert filed.
5-2-79	Motion to Dismiss Amended Complaint of Deft. First Ala Bank filed.
9-26-79	Notice of taking depositions of Michael Orange filed
10-18-79	Order setting scheduling conference at 1:30 p.m. on Nov. 16, 1979
10-24-79	Response of Pltf to motion to dismiss Amended Complaint of Defendant Herbert
✓	Response of Pltf to motion to dismiss Amended Complaint of Deft. First Alabama Bank of Montgomery, N.A.
10-30-79	Order setting Hearing for Nov. 6, 1979 on pending motion to Dismiss Amended Complaint filed.
11-7-79	Scheduling Conference Order filed
11-21-79	Notice to take Deposition of Michael Orange on Dec. 4, 1979, at 9:00 AM filed by pltf.
11-29-79	Notice to take depositions filed
11-29-79	Civil Subp. filed & issued to Mr. William E. Epperson Ex 11-30-79
✓	Civil Subp. filed & issued to Mr. Mark Plummer Ex 11-30-79
✓	Civil Subp. filed & issued to Mr. George Beckwith Ex 11-30-79
11-29-79	Civil Subp. filed & issued to Mr. William B. Hobbs Ex 11-30-79
✓	Civil Subp. filed & issued to Mr. Cecil Brightwell Ex 11-30-79

State of Alabama
Supreme Court
Dept. of Court Mgmt.
Form SC-C-7 11-77

CASE ACTION SUMMARY
CONTINUATION

Case Number
CV 79-179-S
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Page Number 2

DATE	ACTIONS
11-29-79	Civil Subp Iss'd & issued to Mr Charles Hines Ex 11-30-79
✓	Civil Subp Iss'd & issued to Mr Allen Reynolds Ex 11-30-79
✓	Civil Subp Iss'd & issued to Mr Thomas R. Peacock Ex: 11-30-79
✓	Civil Subp Iss'd & issued to Mr. Paul E. Norris Ex 11-30-79
✓	Civil Subp Iss'd & issued to Mr. James S. Haskell, Jr. Ex 11-30-79
12-12-79	Interrogatories to defendant, First Alabama Bk Iss'd.
12-12-79	The Court having read and considered the renewed motion to dismiss filed by Defendant First Alabama Bank of Montgomery, N.A., it is ORDERED that the trustee in bankruptcy for Parson Steel Industries, A. Pope Gordon, be joined as a party plaintiff to this action and that a copy of this Order be mailed to the trustee and his counsel, Honorable James Jerry Wood. It is further ORDERED that the renewed motion to dismiss is in all other respects due to be, and the same is, hereby DENIED. s/William R. Gordon Circuit Judge
12-14-79	Order for U.S Bankruptcy Court -
12-17-79	Notice to take Deposition on December 26, 1979 at 9:00 a.m.
12-17-79	Civil subpoena Iss'd & issued to George Goodwyn Ex: 12-21-79
✓	Civil subpoena Iss'd & issued to William B Gordon Ex: 12-19-79
✓	Civil subpoena Iss'd & issued to Charles Brightwell Ex 12-19-79
✓	Civil subpoena Iss'd & issued to James S. Haskell Jr Ex 12-19-79
✓	Civil subpoena Iss'd & issued to Paul E Norris Ex 12-19-79
✓	Civil subpoena Iss'd & issued to Thomas R Peacock Ex 12-19
✓	Civil subpoena Iss'd & issued to Allen Reynolds Ex: 12-19-79
✓	Civil subpoena Iss'd & issued to William E. Upton Ex: 12-19-
✓	Civil subpoena Iss'd & issued to Mr. Frank Pleasant Ex: 12-19-
✓	Civil subpoena Iss'd & issued to Mr. Charles Hines Ex: 12-19-79
✓	Civil subpoena Iss'd & issued to Howard Kaufman Ex: 12-19-79

COURT RECORD (rev. 1/81)

Date	ACTIONS
12-17-79	Civil subpoena (ft x issued Luther W. Waller) Ex: 12-19-79
12-28-79	Motion to Extend time for Discovery filed by ptfs.
1-8-80	Order granting motion to extend time for discovery filed by ptfs.
1-9-80	Mem. to ptfs Interrs. filed by dfft. Ala. Bank
1-10-80	Notice to take) deposition) on January 24, 1980 at 9:00 a.m.
1/15/80	Notice to take deposition of Luther Waller, Samuel Kaufman & Wm M Richardson fld
1/15/80	Civil subpoena dt issd to Samuel Kaufman Ex 1-17-80
1/15/80	" " " " to Luther Waller Ex 1-17-80
1/16/80	" " " " Wm M Richardson Ex 1-17-80
1-16-80	Notice to take deposition of Cecil Thompson and Don Wolfe
1-23-80	Ordered that the discovery cut-off date is extended through Friday, February 29, 1980
2-13-80	Notice to take deposition of Mrs. Nelba Parsons and Mr. James D. Parsons fld
4-18-80	Motion for summary judgment of dft. Edward Herbert fld
4/23/80	Order setting hearing on deft. Edward Herbert's motion for summary judgment at 2:30 p.m. on May 16, 1980
4/25/80	Order setting hearing on dft. Edward Herbert's motion for summary judgment at 9:00 a.m. on May 27, 1980
5/7/80	Supplemental Pages 147-169 to Exhibit B to Dfts. Bank & Herbert's motions for summary judgment fld.
5-12-80	Memorandum) brief in support of motion) for summary judgment & Exhibit C) Exhibit A Exhibit B) & Exhibit D

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CASE ACTION SUMMARY
CONTINUATION

Case Number 7
CV-79-179-L
ID YR Number

Style:

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DATE	ACTIONS, JUDGMENTS, CASE NOTES
5-16-80	Motion for Summary Judgment by deft OSI Inc. and Michael Orange filed.
5-27-80	Matters in opposition to Defts. First Ala Bank Ed Herbert and Michael Orange's Motions for Summary Judgment fld. w/affidavits, depositions and Exhibits listed (Depositions & Exhibits in Clerk's filing Cabinet)
5-28-80	Motion to Strike Affidavit fld by Defts. First Ala. Bank & Atty and Edward Herbert.
5-28-80	Deposition of Melba Parsons filed.
5-30-80	Memo Brief in opposition to Defts Motion to Strike Affidavits fld by deft.
6-18-80	Reply brief in support by deft. Motions for Summary Judg fld.
7-8-81	Motion for Recusal filed by Pltfs.
7-13-81	Order setting hearing on Pltfs motion for recusal at 2:00 p.m. on July 22, 1981
8/31/81	Order denying Plaintiffs motion for recusal
10/23/81	motion to set trial date filed by pltff.
10/23/81	Order setting sch. Conf for Nov 12, 1981 at 2:30pm held.
11-3-81	Supplementation to Motion for Summary Judgment of deft. Edward Herbert w/Exhibits filed.
11-3-81	Supplementation to Motion for Summary Judgment of deft. First Ala. Bank & Ala.

Date	ACTIONS, JUDGMENTS, CASE NOTES
	w/ Exhibits & seal -
11/1/81	Response of Plff, Response to Dfts to Supplementation of their respective Motions for summary Judgment
11/23/81	~~Motion~~ filed in opposition to Dfts' Motion for summary Judgment filed by Plff.
11/12/81	Ordered that Motions for summary judgment are scheduled to be heard on Nov. 24, 1981 at 1:30 p.m.
3-17-82	Order denying Motion(s) for Summary Judgment filed
3/22/82	Order setting Pre-trial Conf. for April 2, 1982 @ 2:00 P.M.
3/25/82	Answer & Third Ala. Bank of Montgomery, N.A. filed w/ Counterclaim
3/25/82	" " Edward Hulsey, Defs. filed.
4/6/82	Scheduling Conference order for Pretrial Conference on August 27, 1982 at 10:00 a.m. Trial set for October 4, 1982 at 10:00 a.m.
4/27/82	Answer of Plffs Parsons Steel Inc, Jim D. Parsons and Melba L. Parsons to Dft Third Alabama Bank's Third Counterclaim filed
4/27/82	Answer of Plffs Parsons Steel Inc, Jim D. Parsons & Melba L. Parsons to Dft Third Alabama Bank's Second Counterclaim filed
4/30/82	Interrogatories to Dfts. Third Ala. Bank filed by Plffs.
5/24/82	Order filed setting Hearing on Plff's Motion for Summary Judgment for July 14, 1982 @ 10:00 A.M.
5/27/82	Request for Supplementation of Prior Responses filed by Plffs.
5/27/82	Dfts OSI, Inc and Dft Michael Orange's response to "Request for Supplementation of Prior Responses" filed
5/21/82	Answers of Dft First Alabama Bank of Montgomery, N.A. to Plffs Interrogatories filed.
6/2/82	Plff's Brief in support of Motion for summary Judgt. filed.
6/14/82	Amendment to Complaint filed by Plff

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CASE ACTION SUMMARY
CONTINUATION

Case Number 7
CV 79 179
ID YR Number

Style:

Page Number 4 of ____ Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
6/15/82	Request for Production to Defts Michael Orange and OST Inc. fld by Pltfs.
6/15/82	Interrogatories to Defts Orange and OST Inc fld by Pltfs
6/16/82	Motion to Strike, Or in the Alternative, to Dismiss Trustee's Amendment to Complaint fld by Defts, First Ala. Bank & Edward Herbert.
6/16/82	Notice of Pltfs Intention to Serve a Subpoena Pursuant to Rule 34(c)(2) on Non-Party Malcolm Humphreys upon expiration of 15 days (Issue July 2)
6/17/82	Second Amendment to Complaint by Pltfs Parsons Steel Inc, Jim D. Parsons & Nelda L. Parsons fld
6/21/82	Order fld. setting hearing on Defts 1st Ala. Bank) & Mitzy and Edward Herbert's Motion to Strike for July 9, 1982 @ 2:30 P.M.
6/22/82	Motion to Strike, or in the Alternative Answer to second Amendment to Complaint fld by Defts First Alabama Bank & Edward Herbert
6/22/82	Response of Defts First Alabama Bank of Monty, NA and Edward Herbert to Pltfs' Request for Supplementation of Prior Responses fld
6/23/82	Motion to Compel fld by Pltfs.
6/28/82	Order fld setting hearing on Defts Motion to Strike on July 9, 1982 at 2:30 p.m.
7/2/82	Cert. Subpoena for Prod. of Doc., etc. (Non-Party) fld. & issued Fax service to Sheriff, Autauga County for Service on Malcolm Humphreys.

Date	ACTIONS, JUDGMENTS, CASE NOTES
7/9/82	Materials in Support of Motion to Strike Or, in the Alternative, to Dismiss Trustee's Amendment to Complaint fld. by Defts
7/5/82	Response of Trustee to Defts Motion to Strike or in the Alternative Motion to Dismiss fld by Attys. Hon. A. Agee Gordon
7/6/82	Issued Subp. Jas Prod. on Rem - Party Malcolm Humphries
7/22/82	Request for Production of Documents fld. by Defts First Ala Bank of Bitzmy & Edward Herbert
7/22/82	Motion for Default Judgment Against Defts OST Inc & Michael Orange by Pltf's Parsons Steel Inc, Jim D Parsons & Melba L Parsons fld
7/22/82	Motion to Compel fld by Parsons Steel, Inc
7/23/82	Answer of Defts Michael Orange and OST, Inc to Complaint as amended fld.
7/26/82	Show Cause Order fld
7/27/82	Withdrawal of Motion for Default Judgment fld by Pltf's
7/29/82	Ans. of Michael Orange & OSI, Inc. to Interrogatories Served on June 15th fld.
7/29/82	Responses of Defts Michael Orange & OSI, Inc. to Request for Production Served on June 15th.
8/6/82	Notice of Intent to Serve Subp on Non Party Merchants National Bank upon expiration of 15 days fld. by Defts First Ala. Bank of Bitzmy. (Same Eng. 23rd)
8/12/82	Motion to Compel Response to Request for Production fld by Pltf's
8/16/82	Witness List of Defts First Alabama Bank of Montgomery and Edward L. Herbert fld.
8/16/82	Pltf's Parsons Steel Inc., Jim D. Parsons & Melba L. Parsons Witness List fld (Amended)

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CASE ACTION SUMMARY
CONTINUATION

Case Number
CV- 79- 179.6
ID YR Number

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DATE	ACTIONS, JUDGMENTS, CASE NOTES
8/17/82	Request for Prod. to Defts. Michael Orange & OSI, Inc. Fld by Pltfs.
8/18/82	Witness List of Pltf C. Pope Burden, Trustee in Bankruptcy for Parsons Steel Industries, Inc. fld
8/18/82	Motion to Compel Production by Defts Michael Orange & OSI, Inc fld by Pltfs.
8/19/82	Motion to Compel Production filed by Pltfs Request for Production Fld. by Pltfs.
8/19/82	Motion in Limine fld by Pltfs.
8/20/82	Motion for Summary Judgment by Orange & OSI, Inc, fld.
8/22/82	CV. Subp. for Prod. of Doc. Under Rule 34 (b)(2) fld & issued by Defts, 1st Nat. Bk. of Mtgy for service by Sheriff, Mobile Co. to Merchants National Bank
8/27/82	Order filed, Judge Gordon recuse. Reassigned to Judge Taylor
8/31/82	Order setting sched Conf for September 30, 1982 at 2:15 P.M.
8/26/82	Motion for Counsel to be Served Granted. Subp. (Dt) to Merchants National Bank, % E. Creel, Sec.
9-30-82	Scheduling conference. Trial date Jan. 31 1983. Pretrial conference set Jan. 4, 1983 - 9:00
10/12/82	Brief & Materials in Support of Bank & Herbert's Renewed Motion for Summary Judgment fld.
14 Oct '82	Hearing on all pending motions.
1/3/83	Witness List of Defts, First Ala. Bank of Mtgy N.A. & Edward Herbert fld.

Date	ACTIONS, JUDGMENTS, CASE NOTES
1/6/83	Order of Court Compelling Production by Defts. Michael Deaver & OSI Fld.
1/6/83	Order on Plff's Motion to Compel to Defts First Ala. Bank of Pitts., N.A. & Edward Herbert Fld.
1/6/83	Order Fld. Denying Defts' Motion for Summary Judgment
1/7/83	Motion to Dismiss Fld by Defts.
12 Jan 83	Hearing on Motion in Limine.
1/13/83	Order Fld. Denying Defts' Motions to Dismiss as to Plff by Alternative Motions to Strike
1/13/83	Order Fld Granting Motion for Leave to File by A. Pope Gardner, Trustee in Bankruptcy of Plff
1-19-83	Motion of Defts. 1st Ala Bank and Herbert, for Reconsideration of their Motions and Renewed motion for Summary Judgment filed
1-18-83	Contentions of Defts First Ala. Bank of Montgomery, N.A. and Edward Herbert fld
~	Motion for Reconsideration fld by Plffs Parsons Steel and Jim D. Parsons & Nelda L. Parsons
1/20/83	Motion for Summary Judgment of Plff, A. Pope Gardner, Trustee in Bankruptcy
1/19/83	Contentions of Parsons Steel, Inc., Jim D. Parsons & Nelda L. Parsons fld
1/21/83	Order on Motion for Reconsideration of their Motion and Renewed Motion for Summary Judgment fld
1/27/83	ORDERED that Motion in Limine of the Plaintiff is hereby denied, the court is of the general impression that the issue of res judicata is an issue properly to be decided by the Court rather than an issue to be presented to and decided by the jury. This proposition would be especially true where, as in the instant case, the factual issues have been fully presented to the Court in the course of Motions to Dismiss, Motions for Summary Judgment and Motion for Reconsideration of Motion for Summary Judgment and that the facts as regards th

State of Alabama
Unified Judicial System
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CASE ACTION SUMMARY
CONTINUATION

Case Number
CV-79-179 T
ID YR Number

Style:

DATE	ACTIONS, JUDGMENTS, CASE NOTES
	issue of res judicata are clearly undisputed.
	DONE this the 27th day of January, 1983.
	/s/Sam W. Taylor Circuit Judge
1-24-83	ORDERED that Plaintiff's Motion for Reconsideration of this Court's order denying Plaintiffs' Motion for Summary Judgment on Defendant First Alabama Bank's counterclaims is hereby GRANTED. The Court having reconsidered Plaintiffs' Motion for Summary Judgment on Defendant First Alabama Bank's counterclaims it is hereby ORDERED, ADJUDGED and DECREED that said Motion for Summary Judgment be GRANTED. Defendants first and second counterclaims are hereby dismissed. ORDERED, ADJUDGED and DECREED that Defendants First Alabama Bank and Herbert Motion for Reconsideration of their Motion and renewed Motion for Summary Judgment is Hereby DENIED. ORDERED, ADJUDGED and DECREED that the Motion of Defendants Orange and OSI, Inc. for Reconsideration of their Motion an renewed Motion for Summary Judgment is hereby DENIED.
	/s/Sam W. Taylor Circuit Judge
1-27-83 1-28-83	List of documents filed - Plaintiffs Alternative Motion for Reconsideration filed by defts
28 Jan 83	Hearing on Motion for reconsideration of MSJ and on request to certify res judicata question to appellate court and on motion for continuance. Motion denied. 4-Judge Ct. V.
1/28/83	Cross-claim of defts Band and Herbert against OSI and Michael Orange filed.
1/31/83	Ordered, Adjudged and Decreed that said Crossclaim of defendants Band and Herbert against OSI, Inc. and Michael Orange is hereby severed.
	Done this 31st day of January, 1983.
	/s/ Sam W. Taylor, Judge
1/28/83	Renewed Motion for Summary Judg. of Defts. Bank and Herbert filed.
1/31/83	Ordered, Adjudged and Decreed that defendants, Bank and Herbert Renewed Motion for Summary Judgment is hereby Denied.
	Done this the 31st day of January, 1983.
1-28-83. 1-27-83.	Second Amend. to Cross. of Herbert filed - /s/ Sam W. Taylor, Judge. Second Amend. to Cross. of Band et. Band
1/28/83	Objection of Bank and Herbert to Dismissal filed
1/31/83	Stipulation of Dismissal as to Michael Orange and OSI, Inc. filed.
1/31/83	Pro Tanto Release and Settlement Agreement filed.

Forward

Date	ACTIONS, JUDGMENTS, CASE NOTES
1-31-83	Requested Chgang 1st ala Bank and Herbert filed.
	Numerous other motions filed or received in ex ct; all proposed, motions
Jan 31, 1983	Jury trial This date; 2-1-83 - order to file jury charges
Feb 1, 1983	Continuing This date
2	" " "
3	" " "
4	" " "
7	" " "
8	" " "
9	" " " resulting in verdicts by jury
	in favor of A. Pope Gordon as trustee for Persons Steel
	Industries, Inc. for $2,000,000.00; in favor of Persons
	Steel Inc. for $1/2¢; in favor of Jim D. Persons for
	$1,000,000.00; in favor of Melba L. Persons for $1, as to
9 Feb '83	Judgment entered in accordance with verdicts
	Misc 1983-M 101 L. Ray Cox, J.
2/3/83	Motion for Directed verdict of 1st ala Bank filed as qu-
2/14/83	Motion Court for Summary Judgment, or in the Alternative
	Motion to Strike or to dismiss Crossclaim filed by
	Cross-Def Michael Grange.
2-3-83	Motion for Directed verdict of Edward Herbert filed
	in open Court
2-7-83	Memo of Law in support of Def Trustee's Motion
	for Directed verdict filed in open Court.
2-7-83	Motion for Partial Directed verdict filed by
	Def. Trustee against 1st ala Bank in open Court
2/24/83	Alternative Motion for new trial of First Alabama
	Bank of Montgomery, N.A. filed.
2/24/83	Alternative Motion for new trial of Edward Herbert.
	filed

State of Alabama
Unified Judicial System
Form C-7 Rev. 2/79

CASE ACTION SUMMARY
CONTINUATION

Case Number
CV-79-179-J
ID YR Number

Style:

Page Number 7 of ____ Pages

DATE	ACTIONS, JUDGMENTS, CASE NOTES
2/24/83	Motion For Judgment Notwithstanding The Verdict
	Of Deft, First Alabama Bank of Montgomery N.A. Fld.
2/24/83	Motion For Judgment Notwithstanding the Verdict
	of Deft Edward Hubert Fld
3/7/83	Motion For Stay Fld by Defts

STATE OF ALABAMA
MONTGOMERY COUNTY Debra P. Hackett

I, ~~Pauline C. Eubanks~~, Clerk of the Circuit Court of Montgomery County, hereby certify that the within is a true and correct copy of the ~~Case Action Summary~~ Docket CV-79-179. on file in said office.

~~Witness my hand and the seal of said~~ Court is hereto affixed, this the 11th day of March 19 83

Debra P. Hackett
Clerk Circuit Court

Date	ACTIONS, JUDGMENTS, CASE NOTES
1-21-83	Requested Charge of 1st ala Bank and Herbert filed.
	Witnesses & Motions filed or received in court all previously noted
Jan 31, 1983	Jury trial This date; 2-1-83 - order to file jury charges
Feb 1, 1983	Continuing This date
2	" " "
3	" " "
4	" " "
7	" " "
8	" " "
9	" " " resulting in verdict by jury
	in favor of A. Pope Gordon as trustee for Pressed Steel
	Industries Inc. for $2,000,000.00; in favor of Pressed
	Steel Inc. for $1.00; in favor of Jim D. Parsons for
	$1,000,000.00; in favor of Melba L. Parsons for $1.00 w.s.
9 Feb '83	Judgment entered in accordance with verdicts.
	Min Bk 3 - P 101 S. Pugh J.
2/3/83	Motion for Directed verdict of 1st ala Bank filed in open
2/14/83	Motion for Summary Judgment or in the Alternative
	Motion to Strike or to dismiss Crossclaim filed by
	Cross Def Michael Grange.
2-3-83	motion for directed verdict of Edward Herbert filed
	in open court
2-7-83	Opinion of Law in support of Jeff Lunsford's Motion
	for Directed verdict filed in open Court.
2-7-83	motion for Partial Directed verdict filed by
	Jeff. Lunsford against 1st ala Bank in open Court
2/24/83	Alternative Motion for new trial of First Alabama
	Bank of Montgomery, N.A. filed.
2/24/83	Alternative Motion for new trial of Edward Herbert.
	filed

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WITNESSES WHO TESTIFIED IN STATE ACTION

For Plaintiffs:

Edmond W. Hodge
Charles M. Hines
James S. Gaskell, Jr.
James Larry Whitehead
A. Pope Gordon
Tim Hill
Joel Buchanan
Jim D. Parsons
Larson Edge
June N. Williams
Melba L. Parsons

For Defendants:

Paul Corwin
William M. Richardson
Henry Hardegree
John DeLoach
Luther Hill Waller, Jr.
Lanny Crane
Samuel Kaufman
Michael Orange
Edward Herbert



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Plaintiff's Exhibit 4

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

WITNESS LIST OF PLAINTIFF A. POPE GORDON, TRUSTEE IN BANKRUPTCY FOR PARSONS STEEL INDUSTRIES, INC.

Plaintiff A. Pope Gordon, Trustee in Bankruptcy for Parsons Steel Industries, Inc., reserves the right to call the following witnesses at trial:

1. Any persons whose depositions have been taken in the following litigation:

(a) *Parsons Steel Industries, Inc. v. Pollution Control Walther, Inc.*, CV-77-02529, Jefferson County Circuit Court

(b) IN RE: Parsons Steel Industries, Inc.
Honorable A. Pope Gordon v. Parsons Steel Industries, Inc., U. S. Bankruptcy Court, 79-173-N

(c) *Parsons Steel Industries, Inc. v. First Alabama Bank of Montgomery,* U.S. District Court, Middle District of Alabama, 79-249-N

2. Any persons who have offered testimony in the above-named cases.

3. Any witnesses listed by Defendants or Co-Plaintiffs Jim Parsons, Melba Parsons and Parsons Steel Industries, Inc.

4. Any witnesses whose identities or necessity is learned through outstanding discovery.

/s/ Thomas R. Debray
Attorney for Trustee

Plaintiff's Exhibit 5

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

[Caption Omitted]

PLAINTIFFS PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS' WITNESS LIST

Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons expect to call as witnesses at the trial of the above-styled case the following individuals:

1. Edward Herbert
First Alabama Bank
8 Commerce Street
Montgomery, Alabama

2. Reggie Coon
Reynolds Aluminum
4500 5th Avenue South
Birmingham, AL 35222

3. James S. Gaskell, Jr.
First Alabama Bank
8 Commerce Street
Montgomery, Alabama

4. J. Allen Reynolds
First Alabama Bank
Commerce Street
Montgomery, Alabama

5. Larsen Edge
405 #1 Office Park
Mobile, AL

6. Michael Orange OSI Inc
4110 Birmingham Hwy.
Montgomery, Alabama

7. Luther Waller
One Court Square
Montgomery, Alabama

8. William Richardson
First Montgomery Bank
348 Montgomery Street
Montgomery, Alabama

9. Charles M. Hines
3804 Governors Drive
Montgomery, Alabama

10. Russell Chatelain
Avondale Shipyards
New Orleans, LA

11. Bill Burk
U. S. Steel
P. O. Box 599
Fairfield, Alabama

12. Harry Levowitz
Alabama Steel Supply
Montgomery, Alabama

13. John Bear
Gamble Steel
Montgomery, Alabama

14. Samuel Kaufman
One Court Square
Montgomery, Alabama

15. Randy S. Kenner
V. Pres. Natchez Steel
6750 W. Loop South
Suite 100
Bellaire, Texas 77401

16. Frank Copeland
Sabel Steel Service Inc.
749 North Court
Montgomery, Alabama

17. E. W. Hodge
3143 Hathaway Place
Montgomery, Alabama

18. Tom Laille
Old Ridge Road
Rt. 6, Box 207-A
Pratville, AL 36067

19. Charles Chesser
Summit Steel
Birmingham, AL

20. Micky Strange
Shelby Steel
Birmingham, AL

21. Carl Kreuger

22. Shirley Parks
3446 Wilmington Road
Montgomery, Alabama

23. Jim Parsons
5751 Industrial Parkway
Theodore, Alabama

24. Saxton Raines

25. Jim Givens
5212 Maudelayne Dr. S.
Mobile, Alabama

26. Harold McBrayer
J. M. Tull Metal Co.
Birmingham, Alabama

27. J. Allen Reynolds
First Alabama Bank
8 Commerce Street
Montgomery, Alabama

28. William M. Jordan, Jr.
1253 Augusta Street
Montgomery, Alabama

29. Jim Creim
Cumberland Valley Metal
44515 Harding Road
Nashville, Tenn. 37205

30. James Rabalais
P. O. Box 246
Marrero, LA 70072

31. Robert H. Clements, CPA
4300 Midmost Drive
Mobile, Alabama

32. Tim Hill
Bud's Boat Service

33. Larry Whitehead
MCM Industries
Birmingham, AL

34. Lambert Parker
Shelby Steel
Birmingham, Alabama

35. June Neely Williams
Parsons Steel Inc.
Mobile, AL

36. Melba Parsons

37. Joe Cherry

38. Joel Buchannan

39. Tony Artale
Michigan Metals
Birmingham, Alabama

40. Rick Bailes
OSI, Inc.

41. Paul Norris
First Alabama Bank
8 Commerce Street
Montgomery, AL

42. George T. Goodwyn
Goodwyn Engineering
525 Augusta Street
Mongtomery, Alabama

43. Charles Brightwell
2077 Myrtlewood Dr.
Montgomery, Alabama

44. Farley Moody

45. John Mason

46. Luther Ingalls

47. Cecil Spear

48. Malcolm Humphreys

49. Matthew Orange

50. Buzz Harrell

51. Paul Norris

52. Robert G. Myers

53. Al McDonald

54. Any witnesses listed by Defendants.

55. Any witnesses whose identity or necessity is learned through outstanding discovery.

BEASLEY AND WILSON
BY: Frank M. Wilson

Plaintiff's Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

No. 79-249-N

[Caption Omitted]

WITNESS LIST OF PLAINTIFFS
PARSONS STEEL, INC. ET AL

Plaintiff, Parsons Steel, Inc. et al. expects to call as witnesses at the trial of the above-styled case the following individuals:

1. Jim D. Parsons
2. Melba L. Parsons
3. Joseph Cherry
4. June J. Neely
5. Larry Whitehead
6. Tom Laille
7. Tim Hill
8. E. W. Hodge
9. Larsen Edge
10. E. Farley Moody, II
11. Albert Keuler
12. Cecil Thompson
13. Carl Kruegger
14. Robert Mays
15. Al McDonald
16. Robert Dince

17. Ross S. Trawick
18. Henry A. Leslie
19. Walter H. Givham
20. W. Jack James, Jr.
21. S. William Cole
22. F. J. Smyser
23. L. H. Moore
24. Richard C. Solomon
25. William M. Morris
26. W. Donald Davis
27. Edward Herbert
28. William Richardson
29. James S. Gaskell, Jr.
30. Charles M. Hines
31. Paul Norris
32. William E. Epperson
33. Thomas R. Peacock
34. J. Allen Reynolds
35. Charles P. Brightwell
36. George Thomas Goodyin
37. William M. Jordan, Jr.
38. Michael Orange
39. Luther Waller

40. Samuel Kaufman

41. Randy Kenner

42. Ronald J. Gropper

43. Lawrence D. Greenberg

44. James Rabalais

45. Carl Martin

46. William Truitt

47. Frank Copeland

48. Walter E. Nilsen

Plaintiffs expect the expert testimony of the individuals numbered 14-26 to be that the requirement of a change in management and the sale of majority stock in a corporation is not a requirement usually made in connection with an extension of credit especially where, as here, the sale of majority stock generates no additional capital as security for the loan and where no additional loans were made. In addition, it is expected that those witnesses will offer their expert opinions as to whether the loan in question was handled by Defendant as a loan of a corporation in "serious financial difficulty." Those witnesses will further be asked their expert opinions of the manner in which "prudent bank management" should have brought the "serious financial difficulty" of a loan customer to the attention of the bank's top management and are likely to be asked to interpret and give their expert opinions on the various entries on the loan recap of subsidiary.

Dr. Robert Dince will additionally testify concerning the requirements of the Comptroller of the Currency and National Bank Examiners on banking institutions as to internal control and internal reviews of loans. He will almost certainly be ques-

tioned concerning whether or not Defendant followed its own loan policy in the instant case.

Plaintiffs do not anticipate using depositions excpet for impeachment or if one of the previously deposed witnesses is not available at trial.

After deposing Defendant's accounting expert Plaintiffs may be required to introduce expert testimony to contradict his testimony.

It seems apparent from Defendant's lists of witnesses and exhibits that it will question the value of the collateral on the loans to subsidiary. If that is the case, the witnesses numbered 1, 3, 5-8, 12 and 41-48 will be expected to testify as experts in the steel industry to the value of the equipment and inventory of subsidiary. Whether such testimony and additional expert witnesses on that question are necessary will depend in part on the Court's ruling on Plaintiffs' Motion for Clarification now pending.

BEASLEY AND WILSON

BY: Jere L. Beasley

BY: Frank M. Wilson

Attorneys for Plaintiffs

Plaintiff's Exhibit 8

[956] the bank did was a usual, customary, accepted bank practice. Now, during the trial, they also threw in some other things. First of all, they just flatly denied there was anything wrong, which we expected. We expected them to do that. But their real defense was that. And you recall his opening statement to you he said, "It was just an ordinary, garden-type of act by the bank." The act by the bank he was talking about was this: The bank required of a man who had worked in that business after he bought it and had run it, required of him that he give up that business to a stranger, a man that he didn't even know. Give up ownership of it and give up the running of it by allowing this gentleman to become president and chief executive officer of the corporation.

Now, let me ask you first of all, does it make sense that a businessman would give up what he had worked for and what he had earned for one hundred dollars? Does that make sense? A lot of things in this case really hadn't made sense, but when you go back and look at the testimony and analyze it, people like Sam Kaufman, Luther Waller, even June Neely, had no reason to come to court and lie. She had worked for them and she now lives over in Mississippi and came and testified. Ed Hodge had no interest in the **[957]** outcome of this lawsuit; none whatsoever. And he came in here, and do you remember what he said? He said he went out there in October and November and December. He said it was — and I think I am going to quote him accurately — said it was an excellent manufacturing plant. He said the only thing he saw they had too much inventory. And do you recall, I asked him the question, I said, "Mr. Hodge, could that inventory have been sold?" He said, "Without question." I said, "Was it good and useable?" And he said, "Without question." He knew the operation of this plant. Why? Because he had owned it. And he said he had been back out there almost monthly from the day he sold it to Parsons, and he said in December, the critical month, that the in-

ventory was there, it was useable, and it was inventory that could have been sold.

And the reason I asked these questions about the coils, when this case first came to my office and they were talking about coils, I related coils to automobiles. That is the only experience I had had in this field. I asked him what a coil realy was, and I looked at coils, and I found out that a coil could weigh as much as twenty thousand pounds. It could weigh that much. Can you imagine twenty thousand pounds of steel that would be used **[958]** to manufacture a number of items, not just one item as the defense would lead you to believe, but a number of items.

Do you remember what Mr. Hodge said that steel was worth? There was testimony, undisputed, thirty-three cents a pound. And do you recall how many coils they said was on the premises? He said too much. He said he had more inventory than what they could use.

Now, I asked him specifically — and remember what he said when I asked this question? I said, "Mr. Hodge, did you see any scrap as you toured the plant and looked over the facilities?" Do you remember what he said? "Very little. Very little, scrap. All of it was useable, good material."

This is why my good friend, Lannie Crane, who is an excellent accountant and was hired to do a job and he was hired to reach a result given certain information. And do you remember what he said when Mr. Wilson was cross-examining him, very nicely and very easily? He asked him this question: He said something to the effect, "Were most of the assumptions if not all of the assumptions that you made favorable to the bank?" He said, "Yes." "Where did you get the information?" "From Mr. Nachman or Mr. Orange and **[959]** folks on the other side." Nothing from Mr. Parsons. Nothing from anybody who worked for Mr. Parsons, except one secretary who is still out there who he said could give nothing significant. And he admits he didn't know what a coil was and he admits he never had real-

ly seen any of the things he was talking about. He didn't, for example, realize that you estimate work-in-process in many businesses, and that work-in-process is estimated; what could be, say a hundred and twenty thousand, in actuality could have been as much as five hundred thousand. No way for Lannie to know this.

But what I am saying is, Mr. Hodge did know. He had been there. He had seen it. He had owned, in fact, the business at one time; the plant. Can you imagine a plant sitting on twenty acres of land? Three massive buildings? Do you remember what he said about the bay? He compared it to this courtroom. He said one of the bays would be the size of this courtroom. Now, there were many bays in that plant, you see. All of them functional, all of them operative, working with good inventory, good equipment. And if a man who had no interest came in this court and stated under oath that that was an excellent manufacturing facility, I would have to believe **[960]** him. They didn't try to cross-examine him, did you notice, on that point. Very, very light.

Now, obviously the witness who testified who are directly involved, obviously have an interest in the outcome. That would include Mr. and Mrs. Parsons, it would include Mr. Herbert; it would include Mr. Herbert; it would include Mr. Gaskell, it would include Mr. Orange, it would include a number of people who testified for the defense. But I have never seen so many inconsistencies between their own witnesses.

For example, Mr. Waller said — and I think he tried to tell it as straight as he could. He said he saw...felt sure he saw Mr. Herbert over there in a private meeting. He also said he recommended his law partner, Sam Kaufman, which certainly makes sense; if there is a fee to be made, he is going to recommend his partner. And that was back in early...on the 14th of December.

Mr. Orange said Mr. Herb t recommended Mr. Kaufman. Obviously, Mr. Kaufman was already involved. But Mr. Waller and Mr. Kaufman had no reason to come in here and tell anything but the truth.

Do you remember when we were talking about the 8th day — and I wrote it down and circled it for a reason. I said, "When did Michael Orange lose **[961]** interest in the plan you were trying to foster" — the lawyer — "and start on his plan and Mr. Herbert's plan?" And that plan was to turn over the business to a stranger who Jim Parsons didn't even know. I said . . . I asked him several times — the Judge had to fuss at me about it a little bit, but I do that sometimes. I just want to make sure the Jury hears the important points in a trial — I said, "Did Mr. Orange, from that point on until the end of it, talk to you and ask questions about how this would work and how that would work; how he could buy it or anybody else could buy it; how this would work, the legal ramifications?" And do you remember what Mr. Kaufman said? He said, "Yes. Many times. Many times." I asked the same question of Mr. Orange: "No knowledge of it. Couldn't remember it." I asked him this. I said, "Why didn't you use Mr. Kaufman when you got ready to buy this business? Why didn't you use Mr. Waller instead of going out and forming this new corporation and doing it with secretaries and lawyers, not even using your own name, and not even using the initials that finally went into it? Why didn't you do that?" He never did give a very good answer to that, in my opinion.

Now think back for just a minute. This **[962]** bank loaned a person who formed a corporation — a shield-type corporation to keep the individual from having any liability, you see — formed a corporation, loaned that corporation without any assets at that time one point three million dollars. That is a lot of money. A lot of money.

Now, you can bring your own experience into this jury box. You do not have to shut out your experience when you come in to make a decision on a case. Let me ask you this: Would a bank loan anybody who formed a new corporation, unless he was a multi-millionaire many times over, one point three million dollars unless he got some of that multi-millionaire's collateral or some other assets to back up that loan? I don't believe he would. I don't believe Mr. Ed Herbert would do that because he has been in the banking business a long time, a long time. One point three million, Mr. Orange put up one thousand dollars. He got the land, he got all of the assets, all of the coils Mr. Hodge told you about, and Mr. Parsons, all of the equipment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they get a valuable piece of property, they get a good business, they get the Parsons' business. And they [963] are going to tell you that Mr. Parsons benefited from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up.

I want you, when you go back into the jury room to deliberate to look and see if you can find anywhere in these records that have been put into evidence in this case where the bank has any records anywhere bad about Jim Parsons, Melba Parsons, or Parsons Steel, Inc., but specifically, anything bad about the company here in Montgomery. You won't find anything. The first thing you will find is Exhibit 59, I believe, where the Directors meet, and that exhibit will say, basically, that...well, I won't try to state it. I will read it to you.

I will say, exactly, the first report to that board...and remember this. Mr. Herbert wrote the manual. I want you to read, if you will — now, I hate to ask you to do this because it is fairly thick — but find the sections in here that define the responsibilities of the loan officer, find Mr. Herbert's responsibility in this book, find the directors loan committee's responsibility in this book, and see exactly what it says they are supposed to do. And then after you do that, you take the documents

[964] that show the transactions...and you recall what Dr. Dense who testified who we hired as an expert — and we certainly don't apologize for that. Each side has a right to bring in experts and put them on the stand, especially in critical points. And the critical point in this case is — was there a violation of the bank holding company act. The critical issue is was what the bank did — which they now deny, or which they spent most of their time trying to justify, if you remember — was that a usual, in other words a customary, accepted, appropriate banking practice; as Mr. Nachman says, a garden variety type act by the bank?

I want you to go back and look at the records and find anywhere in here, up until the bank did this to the Parsons, where they say anything but good about the Parsons, about this business. And then take...Mr. Hines made this report, and I guarantee you that Mr. Hines hated to testify in this case. He didn't want to be on that stand. I don't blame him. Because he did exactly what anybody would have done; he made the review and he said he talked to the loan officer, Mr. Richardson, and he said...He answered all my questions just as honestly as he could. He said, "Yes, he did this. He made the **[965]** review."

Now, obviously if the loan had been in trouble they wouldn't have turned it over to a junior person in the bank that has got a responsible position, but they would have given it to somebody, I believe, that would have really torn this thing apart if the loan had been in trouble in August of 1978 like Mr. Richardson would not like you to believe.

Everything just ties together, Ladies and Gentlemen. Look at the records; at what they put on the stand. Think back on the testimony. They violated this Act. It is not a criminal trial, though. There is no criminal act on the part of the bank, in my opinion. I believe they violated the civil law, without question. I think they have damaged the Parsons, without question, they have hurt them.

But the issue in this case is, did they violate the Bank Holding Company Act? Now, I want you to just look at these records. Look at them carefully because that is really what the lawsuit is all about.

Dr. Dense, as I was going to tell you, made the statement on that stand that he acutally helped write the manual for the examiners who examine these national banks. He has actually been involved **[966]** in that activity. He actually has great knowledge of the banking industry. They didn't try to destroy Dr. Dense's credibility. In fact, they didn't question anything about it. This man knows his business. He is an expert. He said he has testified on both sides; he has testified for banks and he has testified for plaintiffs, and he tells it exactly like it is. He didn't try to dodge any questions. The Judge had to fuss at him one time about fencing with Mr. Nachman and, frankly, I wish he hadn't. But the whole truth of the matter is, he said if there was anything wrong with that loan you would find it in the bank records. Do you remember that question asked him? He said it would be in the bank's records if the Parsons had done anything wrong. So, that tells me they didn't consider this much of a problem loan, really. It was well collateralized. Look at what the records said.

Go back to...Mr. Herbert himself passed on that loan back in '77 for a half a million dollars; five hundred thousand dollars. They made Mr. Parsons put up everything you can imagine. Made his wife sign a personal guaranty — of course, she did on the stock — they got a guarantee out of it, also they got one out of Mr. Parsons, also they got the land...**[967]** or a mortgage, which Mr. Herbert skillfully didn't tell you much about during the direct testimony.

You remember what he said? Exactly what he said? I wrote it down. And I hope Mr. Nachman disputes me on this one point because he is going to dispute me on a lot of points. I want him to dispute me on this fact: Mr. Herbert, as I recall his testimony,

said, the reason that we had to take hold of this plan of Jim Parsons — where he wanted to give his business away — the reason we accepted it so quickly and didn't even talk to Mr. Orange much — just sort of like he was a stranger to us; we have never heard of this man Orange — and you remember all this. Mr. Herbert said, "The reason we had to do it was because Jim Parsons could throw us off the land if we were to go in there and take this plant."

Now, let me tell you the exact truth on that. On cross-examination he said, "Yes. We did have a mortgage. Yes. We did." I said, "Could you have foreclosed that mortgage just like you did the personal property?" He kind of ducked his head.

Did you notice on direct examination he was eager to answer questions? Made a magnificent witness. In fact, sometimes he even answered the questions before the lawyer really asked them. In fact, do you **[968]** remember when we were talking about the business of the private meetings? He refused on that because he knew the answer to the question was something else. And he said "I made one mistake." Said, "Yes, I thought I was in that meeting but I really wasn't, even though Mr. Waller saw me and Mr. Kaufman saw me." And Mr. Orange, I believe, also saw him — I am not sure what he testified on that.

But now he is trying to say that "we just had no choice but to take this land...or this property, this plant. Because he still had the land." But he admitted on cross-examination, "Yes. We could have foreclosed"; reluctantly he admitted it. But he said, "They didn't owe us but two hundred thousand dollars. We couldn't get but that part of it." I think that is incorrect and I think the Court will so state that they have a right to foreclose the mortgage, and the only rights that the landowner has is to redeem it at any time later within a certain period of time in this state, if he can get up two hundred thousand dollars plus the cost and everything that the bank has spent as a result

of this. That is the law of the state, and if not I will be corrected.

Now, let me ask you this: If Jim Parsons in that little short time could have come up with two **[969]** hundred thousand dollars, that quick from the corporation, why didn't he just pay the notes up to date? They were without question in default. Look at them closely to see when they were in default. You notice they didn't say much about that.

Now, it all just ties right together when you think about it; when you analyze it. And I believe that any argument that Jim Parsons gained out of this is going to be mighty hard to sustain because, obviously, without question, this was a good business. Everybody has cash flow problems, anybody in the business has it.

I will have the opportunity to respond very briefly to Mr. Nachman's argument to you. I appreciate your attention, and I will reserve the rest of my time for then. Thank you.

THE COURT: Mr. Nachman?

MR. NACHMAN: May it please the Court, and Ladies and Gentlemen of the Jury. I want to join Jere Beasley in thanking you for your attention here in very difficult circumstances. I know that most of you had to come a long way for a four-day trial, and we appreciate it because you people and the Judge here are the only people that we have to resolve the disputes when they arise between persons or persons and...

Plaintiff's Exhibit 9

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. 83-304-T
[Caption Omitted]

SUMMONS

To Any Sheriff or any person authorized by Rule 4.1(B) of the Alabama Rules of Civil Procedure to effect service in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendant.

FIRST ALABAMA BANCSHARES
c/o ROBERT E. STEINER, III
8th Floor
First Alabama Bank Building
Montgomery, Alabama 36104

FIRST ALABAMA BANK OF MONTGOMERY
c/o James S. Gaskell, Jr.
8 Commerce Street
Montgomery, Alabama 36104

Each defendant is required to serve a copy of a written answer to the complaint upon

Honorable Jere L. Beasley
Attorney at Law

plaintiff's attorney, whose address is

P. O. Box 4537
Montgomery, Alabama 36101

within thirty (30) days after service of this summons excluding the day of service of the summons and to file the original of said written answer with the Clerk of this Court at the time of service of the answer upon the Attorney of Record for the Plaintiff or

within a reasonable time thereafter. If any defendant fails to do so, a judgment be default may be entered against that defendant for the relief claimed in the complaint.

DEBRA P. HACKETT
Clerk and Register

COMPLAINT

1. Plaintiff Jim D. Parsons is over the age of nineteen years and a resident citizen of Mobile County, Alabama.

2. Plaintiff Melba L. Parsons is over the age of nineteen years and a resident citizen of Mobile County, Alabama.

3. Plaintiff Parsons Steel, Inc. is an Alabama corporation with its principal place of business in Mobile County, Alabama.

4. Defendant First Alabama Bancshares (hereinafter "Bancshares") is a bank holding company and owns all or substantially all of the outstanding shares of Defendants First Alabama Bank of Montgomery, N.A. and Merchants National Bank. At all times material hereto Defendant Bancshares was in control of Defendant First Alabama Bank of Montgomery, N.A. and Merchants National Bank.

5. Defendant First Alabama Bank of Montgomery, N.A. (hereinafter "First Alabama") is a national banking organization with its principal place of business in Montgomery County, Alabama.

6. Defendant Merchants National Bank (hereinafter "Merchants National") is a national banking organization with its principal place of business in Mobile County, Alabama. At all times material hereto after January 1, 1982, Defendant Merchants National was owned and controlled by Defendant Bancshares.

7. At all times material hereto Plaintiffs Jim D. Parsons and Melba L. Parsons personally guaranteed the debt of Parsons Steel Inc. to Merchants National. In addition, Merchants National held a second mortgage on the Parsons family home as security.

8. On or about February 15, 1979, Plaintiffs filed suit against Defendant First Alabama and others for fraud, conspiracy to defraud, breach of fiduciary duty, and violations of the Alabama Uniform Commercial Code in Montgomery County Circuit Court in an action styled Parsons Steel Industries, Inc., et al. v. First Alabama Bank of Montgomery, N.A., et al., Civil Action No. CV-79-179-TA (hereinafter "Circuit Court action"). Parsons Steel Industries, Inc., a wholly owned subsidiary of Parsons Steel, Inc., was also a plaintiff in that action, and was later replaced by the Trustee in Bankruptcy.

9. On or about February 9, 1983, a jury returned a verdict in the aggregate amount of $4,000,001.00 against First Alabama and its Senior Vice President Edward Herbert in the Circuit Court action.

10. Prior to the trial date two other Co-Defendants entered into a pro tanto settlement with Plaintiffs in said action and were dismissed as Defendants.

11. Since 1972, Plaintiff Parsons Steel, Inc. has been a loan customer of Defendant Merchants National. Said Plaintiff has been a good loan customer of the bank. In 1978, Plaintiff Parsons Steel, Inc. had a line of credit with Defendant Merchants of approximately $2,000,000.00.

12. In 1979, as a result of the wrongful acts of Defendant First Alabama and others, as alleged in the Circuit Court action, Plaintiff Parsons Steel, Inc.'s wholly owned subsidiary (Parsons Steel Industries) was rendered an involuntary bankrupt. After its adjudication as an involuntary bankrupt, Parsons Steel Industries only asset was its claim against Defendant First Alabama Bank and others for the wrongs done to it.

13. Defendant Merchants National continued to finance Plaintiff Parsons Steel, Inc. under the same financing arrangement although the assets of Parsons Steel, Inc. were greatly reduced by the forced bankruptcy of its wholly owned subsidiary.

14. In approximately December of 1981, Defendant Bancshares obtained a controlling interest in Defendant Merchants National and the merger of Defendant Merchants National into Defendant Bancshares (the bank holding company) was approved by the Comptroller of the currency. At that time Plaintiffs' claim against Defendant First Alabama was pending in Montgomery County Circuit Court.

15. In February of 1982, Defendant Merchants National forced Plaintiff Parsons Steel, Inc. to materially alter the customary method of financing its business. At that time Plaintiff Parsons Steel, Inc. was totally and completely dependent upon Defendant Merchants National for financing, due to its long-standing relationship and the devaluation of its assets caused by the wrongs of Defendant First Alabama and others. Plaintiff Parsons Steel, Inc. had no alternative but to accept the change in method of financing forced on it by Defendant Merchants National.

16. Defendant Merchants National forced and coerced Plaintiff Parsons Steel, Inc. to meterially alter its method of financing, but agreed to the continued financing of the business on a specified formula agreed to between the parties.

17. Loan officers of Defendant Merchants National, acting as its agents, promised to continue financing Plaintiff Parsons Steel, Inc. under the above-stated formula.

18. In the Fall of 1982, Plaintiffs discovered for the first time that Defendant Merchants National had never advanced funds in accordance with the formula, which had been forced on Plaintiffs. Plaintiff Jim D. Parsons, on behalf of the other

Plaintiffs, demanded that Defendant Merchants National live up to its agreement but said Defendant refused.

19. On or about December 3, 1982, the method of financing Parsons Steel, Inc. was again altered, in that Defendant Merchants National, by and through its loan officers, agreed ot the continued financing, as before, with the one change that Plaintiff Parsons Steel, Inc. would only be required to pay interest monthly at 7%. The change was made retroactive to November 1, 1982.

20. In or about November, 1982, Defendant Merchants National failed and refused to open letters of credit for Plaintiff Parsons Steel, Inc., although the amounts were well within the agreed upon financing arrangement, and fail and refuse to do so to the present date.

21. During the week of January 24, 1983, negotiations took place between the parties to the Montgomery County Circuit court action concerning the possibility of settlement. Plaintiffs are informed and believe, and upon information and belief, allege that Defendants Bancshares and Merchants National were parties to those negotiations and participated in them.

22. On or about February 9, 1983, jury verdicts were returned in the Circuit Court action in favor of the Plaintiffs therein as follows: Parsons Steel Industries, Inc. in the amount of $2,000,000.00; Parsons Steel, Inc. in the amount of $1.00; Jim D. Parsons in the amount of $1,000,000.00; and Melba L. Parsons in the amount of $1,000,000.00. After the payment of all creditors approximately $1,200,000.00 of the $2,000,000.00 verdict in favor of Parsons Steel Industries, Inc. will be an asset of Parsons Steel, Inc.

23. After the jury verdict, Plaintiff Jim D. Parsons and Melba L. Parsons met with representatives of Defendant Merchants National to discuss a change in the method of financing of Parsons Steel, Inc. Plaintiffs were informed that no change

was possible unless they agreed to assign all interest in the jury verdict in the above mentioned Circuit Court action to Defendant Merchants National. Plaintiffs were instructed by loan officers of Defendant Merchants National to propose a method which would provide for the proper financing of Parsons Steel, Inc.

24. A meeting was held on or about February 11, 1983, attended by representatives of Bancshares, First Alabama and Merchants National. Plaintiffs are informed that Merchants National gave confidential information concerning Parsons Steel, Inc. to Bancshares and First Alabama. Plaintiffs further allege that the purpose of the meeting was to discuss methods and means by which to force Plaintiffs to settle the Circuit Court action at less than its full value.

25. Plaintiff Jim D. Parsons met with the accountant for Parsons Steel, Inc. and worked out the details of the plan he would propose to Defendant Merchants National.

26. When Jim D. Parsons contacted Defendant Merchants National in order to set up a meeting so that the proposal could be discussed, he was informed that Defendant Merchants National had been instructed by Defendant Bancshares not to continue financing Parsons Steel, Inc. unless the Circuit Court action against Defendant First Alabama was settled.

27. Jim D. Parsons then requested that the letters of credit that were currently pending at Merchants National and which were then well within the established credit line be opened. Defendant Merchants National refused to take any action to continue financing Parsons Steel, Inc. under the current formula unless the Circuit Court action was settled. Jim D. Parsons was instructed by Defendant Merchants National to make a specific proposal which would settle matters both at Merchants National and First Alabama Bank of Montgomery, N.A.

COUNT ONE

28. Plaintiffs reallege paragraphs 1 through 27 of their complaint as if set out here in full.

29. Defendant Merchants National has breached its contract with Plaintiff Parsons Steel, Inc. for the financing of the business.

30. As a result, Plaintiffs have been damaged as follows: a. Parsons Steel, Inc. has lost business and has lost its ability to do business;

Jim D. Parsons has suffered severe emotional distress and mental pain and anguish;

Melba L. Parsons has suffered severe emotional distress and mental pain and anguish.

COUNT TWO

31. Plaintiff realleges paragraphs 1 through 27 of their complaint as if set out here in full.

32. When Defendant Merchants National, by and through its agents, servants or employees, promised to finance Parsons Steel, Inc., under the formula forced upon said Plaintiff in February, 1982, it never intended to perform that promise.

33. The promises made by Defendant Merchants National, by and through its loan officers, were made with no intention of performing them and with the intent to deceive Plaintiffs.

34. The fraudulent actions of Defendant Merchants National, as alleged in this count, were done intentionally, willfully and wantonly and with a design to harm Plaintiffs.

35. Plaintiffs relied upon the misrepresentations by said Defendant and continued to do business with this Defendant and did not attempt to secure other bank financing.

36. Plaintiffs were damaged as a result of the fraudulent actions of Defendant Merchants National as set forth in paragraph 30 above.

COUNT THREE

37. Plaintiffs reallege paragraphs 1 through 27 of their complaint as if set out here in full.

38. Defendants entered into a conspiracy beginning on or about January 1, 1982, to force an unreasonable and unwarranted financing arrangement on Parsons Steel, Inc. knowing that the result of the said method would be to restrict Parsons Steel, Inc.'s ability to do business and ultimately result in its demise.

39. By forcing the said financing arrangement on Parsons Steel, Inc. Defendants intended to deprive Plaintiffs of their ability to continue prosecution of the Circuit Court action to a successful conclusion.

40. The actions of Defendants alleged in this Count were done maliciously, willfully, and intentionally.

41. Defendant Bancshares and First Alabama are guilty of the fraudulent acts performed by Defendant Merchants National as a result of conspiracy.

42. Plaintiffs were damaged as a result of the conspiracy alleged in this count as set forth in paragraph 30 above.

COUNT FOUR

43. Plaintiffs reallege paragraphs 1 through 27 of their complaint as if set out here in full.

44. A contractual relationship existed between Plaintiffs and Defendant Merchants National.

45. Defendants First Alabama and Bancshares have intentionally, wrongfully, and tortiously interfered with that contract.

46. Plaintiffs have been damaged as a result of Defendants First Alabama and Bancshares intentional, wrongful, and tortious interference with the above contractual relationship.

47. Plaintiffs were damaged as set out in paragraph 30 above.

COUNT FIVE

48. Plaintiffs reallege paragraphs 1 through 27 of their original complaint as if set out here in full.

49. Beginning on or about January 1, 1982, and continuing to date, Defendants conspired to deprive Plaintiffs of their business and/or property.

50. As a part of the said conspiracy, it was agreed by between and among the Defendants that the following overt acts would be performed:

a. Defendant Merchants National through the use of its economic power resulting from the longstanding relationship between Plaintiffs and Merchants National, and the damage done to Plaintiffs as a result of the wrongful actions alleged in the Circuit Court action, to force upon Plaintiffs an unnecessary and unwarranted financing arrangement which would restrict Plaintiff Parsons Steel, Inc.'s borrowing to the extent that it would lose its ability to do business.

b. That Defendant Merchants National would put pressure on Plaintiffs to settle their claim against Defendant First Alabama;

c. That Defendant Merchants National would fail and refuse to honor the financing arrangement it had forced on Plaintiffs;

d. That Defendant Merchants National would ignore letters of credit requested by Plaintiff Parsons Steel, Inc. and refuse to honor said letters of credit, even though well within the financing arrangement forced on Plaintiff by Defendants;

e. That Defendant Merchants National would condition continuation of financing for Plaintiff Parsons Steel, Inc. on Plaintiffs' settlement of its claim against Defendant First Alabama for less than full value;

f. That Defendants would from time to time in person and by telephone discuss the status of the ongoing conspiracy;

g. That Defendant Merchants National would provide Bancshares and First Alabama with confidential information relating to Plaintiffs.

51. As a result of the aforesaid conspiracy, Plaintiffs have suffered substantial damage in their business.

COUNT SIX

52. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 27 of their complaint as if set out here in full.

53. Defendants, acting together and in concert, intentionally and by design, or recklessly, inflicted severe emotional distress on Plaintiffs Jim D. Parsons and Melba L. Parsons.

54. Defendants intentionally, willfully, and in bad faith, committed the acts alleged hereinabove with an intent to injure and damage said Plaintiffs.

55. Defendants knew, or should have known, that their actions would have the intended or desired effect and that Plaintiffs would lose their business in Mobile, Alabama.

56. Defendants' actions were designed solely for the purpose of securing a settlement of the Circuit Court action on terms favorable to Defendant First Alabama Bank.

57. The aforesaid acts by Defendants were extreme and outrageous and were designed to injure and damage Plaintiffs Jim D. Parsons and Melba L. Parsons.

58. As a result, each Plaintiff has suffered severe emotional distress and were injured and damaged as set forth in paragraph 30 above.

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

1. Compensatory damages in the following amounts:

Parsons Steel, Inc.	$15,000,000.00
Jim D. Parsons	$ 2,500,000.00
Melba L. Parsons	$ 2,500,000.00

2. Punitive damages in the following amounts:

Parsons Steel, Inc.	$33,000,000.00
Jim D. Parsons	$33,000,000.00
Melba L. Parsons	$33,000,000.00

3. Their costs of this action.

BEASLEY AND WILSON

BY: Jere L. Beasley
Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand trial by jury for all issues of this cause.

Jere L. Beasley
Of Counsel

Defendant's Exhibit 1

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

RENEWED MOTION TO DISMISS AMENDED COMPLAINT OF DEFENDANT FIRST ALABAMA BANK OF MONTGOMERY, N.A.

Defendant, First Alabama Bank of Montgomery, N.A., moves that the Court dismiss the complaint as amended, in its entirety, and each count thereof, on the following separate and several grounds:

1. Plaintiff Parsons Steel Industries, Inc. has no standing to bring this action, and is an improper party to it, in that it has been adjudged a bankrupt in In Re: Parsons Steel Industries, Inc., Bankruptcy No. 79-173-N, United States District Court for The Middle District of Alabama, and the real party in interest to prosecute its rights in this action is the Trustee in Bankruptcy, A. Pope Gordon.

2. Complete relief in this action cannot be accorded among the parties without the joinder of the Trustee in Bankruptcy for Parsons Steel Industries, A. Pope Gordon, in that he claims an interest relating to the subject of this action and is so situated that the disposition of the action in his absence may as a practical matter impede his ability to protect that interest or leave the Defendant First Alabama Bank of Montgomery, N.A. subject to a substantial risk of incurring double, multiple, or inconsistent obligations by reason of the Trustee's claim.

3. Plaintiffs, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action, and are improper parties to it.

4. There is no jurisdiction of the subject matter insofar as the actions of these plaintiffs are concerned.

5. Defendant assigns grounds 3 and 4 on the basis that neither officers, nor stockholders, nor controlling stockholders, nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

6. The complaint, as amended and each count thereof, fails to state a claim upon which relief can be granted.

7. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted.

8. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted in that fraud has not been averred with the particularity required by Rule 9(b) A.R.C.P.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.
Attorney for Defendant, First
Alabama Bank of Montgomery

Defendant's Exhibit 2

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

RENEWED MOTION TO DISMISS AMENDED COMPLAINT OF DEFENDANT HERBERT

Defendant, Edward Herbert, moves that the Court dismiss the complaint as amended, in its entirety, and each count thereof, on the following separate and several grounds:

1. Plaintiff Parsons Steel Industries, Inc. has no standing to bring this action, and is an improper party to it, in that it has been adjudged a bankrupt in In Re: Parsons Steel Industries, Inc., Bankruptcy No. 79-173-N, United States District Court for The Middle District of Alabama, and the real party in interest to prosecute its rights in this action is the Trustee in Bankruptcy, A. Pope Gordon.

2. Complete relief in this action cannot be accorded among the parties without the joinder of the Trustee in Bankruptcy for Parsons Steel Industries, A. Pope Gordon, in that he claims an interest relating to the subject of this action and is so situated that the disposition of the action in his absence may as a practical matter impede his ability to protect that interest or leave the Defendant Herbert subject to a substantial risk of incurring double, multiple, or inconsistent obligations by reason of the Trustee's claim.

3. Plaintiffs, Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action, and are improper parties to it.

4. There is no jurisdiction of the subject matter insofar as the actions of these plaintiffs are concerned.

5. Defendant assigns grounds 3 and 4 on the basis that neither officers, nor stockholders, nor controlling stockholders, nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and to the stockholder.

6. The complaint, as amended and each count thereof, fails to state a claim upon which relief can be granted.

7. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted.

8. The complaint, as amended and each count thereof, fails to state a claim against this defendant upon which relief can be granted in that fraud has not been averred with the particularity required by Rule 9(b) A.R.C.P.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.
Attorney for Defendant
Edward Herbert

Defendant's Exhibit 3

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

ORDER

The Court having read and considered the renewed motion to dismiss filed by Defendant First Alabama Bank of Montgomery, N.A., it is ORDERED that the trustee in bankruptcy for Parson Steel Industries, A. Pope Gordon, be joined as a party plaintiff to this action and that a copy of this Order be mailed to the trustee and his counsel, Honorable James Jerry Wood.

It is further ORDERED that the renewed motion to dismiss is in all other respects due to be, and the same is, hereby DENIED.

DONE AND ORDERED this the 12th day of December, 1979.

/s/ William R. Gordon
Circuit Judge

Defendant's Exhibit 4

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
No. CV-79-179-G
[Caption Omitted]

ORDER DENYING SUMMARY JUDGMENT

The court having read and considered defendants' Motions for Summary Judgment, and the court having further read and considered briefs of counsel concerning said motions, the court is of the opinion that the plaintiffs' claim that the value of their stock was reduced is not sufficient grounds to support a personal cause of action against the defendants. The court is of the further opinion, however, that the plaintiffs' personal guaranty of the loans from the defendant First Alabama Bank to subsidiary, which guaranty has not been released by the bank, constitutes sufficient basis for plaintiffs to maintain this action in their individual capacities. The court further finds that neither *res judicata* nor *collateral estoppel* precludes the prosecution of the instant claim.

It is therefore, ORDERED that the defendants' Motions for Summary Judgment are DENIED.

DONE and ORDERED in chambers this 17th day of March, 1982.

/s/ William R. Gordon
Circuit Judge

Defendant's Exhibit 8

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-T

[Caption Omitted]

ORDER OF COURT ON SUMMARY JUDGMENT

Defendants First Alabama Bank of Montgomery, N.A., Edward Herbert, OSI, Inc. and Michael Orange, having filed their respective motions for summary judgment; and the Plaintiffs having filed matters in opposition to the pending motions for summary judgment; and the Court, having considered the evidence and matters submitted both in support of and in opposition to the several motions for summary judgment and having read briefs and arguments of counsel, is of the opinion that there are genuine issues as to material facts existing in this cause and that the motions for summary judgment are each to be denied.

It is therefore ORDERED and ADJUDGED by the Court that the Defendants' motions for summary judgment are hereby denied.

DATED: January 6, 1983

/s/ Sam Taylor
Circuit Judge

Defendant's Exhibit 9

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-T
[Caption Omitted]

CONTENTIONS OF DEFENDANTS FIRST ALABAMA BANK OF MONTGOMERY, N.A. and EDWARD HERBERT

1. These defendants were served with the contentions of Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons and the contentions of the Trustee in Bankruptcy for the estate of Parsons Steel Industries, Inc., both of which refer to and incorporate by reference their complaints as amended. Accordingly, these defendants adopt by reference their answers, as amended, to plaintiffs amended complaints, including the admissions, denials, and affirmative defenses contained therein, and their first and second counterclaims, heretofore filed in this action.

2. With respect to the contentions of Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons, these defendants deny that those plaintiffs are entitled to any relief under any theory of recovery, including those described in paragraphs 1, 2, 3, 4, 5, 6 and 7 of their contentions dated January 13, 1983. Further, these defendants deny the factual allegations contained in those contentions.

3. With respect to the statement of contentions of the Trustee in Bankruptcy of the estate of Parsons Steel Industries, Inc., these defendants deny that the Trustee is entitled to any relief under any theory including those described in paragraphs 1 through 21 inclusive, of his contentions dated January 14, 1983. These defendants further deny the factual allegations contained in Trustee's contentions.

4. Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action and are improper parties to it.

5. This action is barred in its entirety by principles of *res judicata* and collateral estoppel.

6. Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons cannot maintain an action to recover for alleged injuries to Parsons Steel Industries, Inc.

7. Each and every claim for relief asserted by any or all of the plaintiffs fails to state a claim against these defendants upon which relief can be granted.

8. All plaintiffs are barred by the doctrine of consent because they were willing participants in the acts, omissions or transactions about which they complain.

9. All plaintiffs are barred by the doctrine of estoppel because they were willing participants in the acts, omissions or transactions about which they complain.

10. All plaintiffs are barred by the doctrine of waiver and have waived any right or standing to complain about the acts, omissions or transactions about which they complain.

11. Plaintiff Parsons Steel Industries, Inc. has admitted in writing the falsity of all material and relevant allegations of its complaint and has admitted in writing in a prior action, that it is not entitled to any of the relief sought in this action.

12. Plaintiffs are barred from complaining about the notice of the sale because they executed a post-default waiver of notice.

13. Plaintiffs are barred from complaining about the manner, method, time, price, terms or commercial reasonableness of the sale of the collateral since they consented to it.

14. Without waiving these defendants' contentions that plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons have no standing to bring this action, these defendants contend that the order of March 17, 1982 in this cause precludes or limits any recovery by the plaintiffs.

15. With respect to the defendants' first counterclaim filed March 25, 1982, these defendants contend that Parsons Steel In-

dustries, Inc. executed certain notes in favor of First Alabama Bank of Montgomery, N.A., which notes were personally guaranteed by Jim D. Parsons and Melba L. Parsons, as more particularly identified in the first counterclaim of these defendants, and under the terms of said notes, these defendants are entitled to their costs and legal expenses incurred in any suit connected with the repossession or sale of the collateral securing said notes and that the debtors are liable to the Bank for any deficiency that may arise from sale or disposition of collateral. These defendants contend that under that particular provision of the notes, plaintiffs are liable to these defendants for their attorneys fees and legal costs and expenses arising out of or related to this action, the federal action or the foreclosure and sale of the collateral and related costs and interest; and, further, any recovery by plaintiffs in this action would create a deficiency under the notes which would be owed to and immediately due and payable to these defendants under the notes.

16. With respect to defendants' second counterclaim filed March 25, 1982, these defendants allege that plaintiff Jim D. Parsons, for himself and all other plaintiffs, fraudulently induced these defendants to lend plaintiffs funds by knowingly, intentionally and deceitfully making false statements or reports or willfully overvaluing land, property or security or both, which said fraudulent representations are more particularly described in said second counterclaim. These defendants suffered certain injuries and damages as a proximate result of this fraudulent misconduct by plaintiffs including financial losses on loans to plaintiffs, the costs of defense of this action and the federal action, and the amount of any damages assessed and the financial impact of any relief in this action and all of the damages more particulary described in the first counterclaim, for which these defendants are entitled to recover compensatory and punitive damages, with interest and costs.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 10

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-T

[Caption Omitted]

CONTENTIONS OF PARSONS STEEL, INC., JIM D. PARSONS AND MELBA L. PARSONS

Plaintiffs Parsons Steel, Inc., Jim D. Parsons and Melba L. Parsons claim compensatory and punitive damages from Defendants First Alabama Bank of Montgomery, Edward Herbert, OSI, Inc., and Michael Orange for injuries these Plaintiffs suffered separate and aside from injury to Plaintiff Parsons Steel Industries, Inc. as a result of the wrongs of Defendants as more particularly set out herein. Parsons Steel, Inc. was the sole stockholder of Industries. Melba L. Parsons and Jim D. Parsons owned ninety-eight (98) shares and one (1) share respectively of the stock of Parsons Steel, Inc. At all times these Plaintiffs were guarantors of the loans from Defendant First Alabama Bank to Parsons Steel Industries.

1. COUNT ONE. Plaintiffs contend that the actions of Defendants as more particularly described in the complaint were done with an actual intent to deceive and injure and damage Plaintiffs and as such were fraudulent. The actions of Defendants were done in bad faith and Plaintiffs relied on the representations and actions of Defendants described to their detriment.

2. COUNT TWO. Plaintiffs contend that under the circumstances existing at the time, as more fully set out in the complaint, Defendants owed a duty to Plaintiffs to safeguard their interest in all transactions involving Defendants acting in concert breached that duty and these Plaintiffs were greatly damaged as a result. By inserting Orange as President and Chief Executive Officer of Subsidiary and thereby injecting themselves into the management of that corporation Defendants Herbert and Bank assumed a fiduciary duty to these Plaintiffs.

3. COUNT SEVEN. Under the circumstances as more fully set out in the complaint Defendant Orange owed a fiduciary duty to these Plaintiffs separate and distinct from the fiduciary duty Orange owed to Industries as its Chief Executive Officer. Through his actions as alleged herein Orange breached that fiduciary duty and these Plaintiffs were damaged as a result.

4. COUNT EIGHT. Plaintiffs contend that Defendants acting in concert participated in a fraudulent conspiracy to accomplish the takeover of Industries for Defendant Orange through Defendant OSI. These Plaintiffs were damaged as a result separate and in addition to the damages suffered by Industries.

5. COUNT NINE. These Plaintiffs contend that the sale of the assets of Industries on or about January 17, 1979 was conducted in a commercially unreasonable method and manner in violation of Alabama law. These Plaintiffs claim damage for injuries suffered as a result of the commercially unreasonable sale separate and in addition to damages suffered by Industries.

6. COUNT TWELVE. Without in any manner limiting their contention that the actions of Defendants as alleged in the complaint amounted to a fraudulent conspiracy through a plan and scheme designed to accomplish the takeover of Industries, these Plaintiffs allege that Defendants made the following specific fraudulent statements with the intent to deceive:

a. Defendant First Alabama Bank by and through its agent, William M. Richardson, stated in September, 1978 that Bank would restructure the then existing debt of Industries and would advance additional funds if Parsons would deposit an additional $100,000.00 of capital into Industries.

b. On or about December 12, 1978 Defendant Herbert, acting as agent for Defendant Bank, promised Plaintiff Jim D. Parsons that First Alabama Bank would make additional loans and advance additional monies to Industries if Parsons would make Orange chief executive officer of Subsidiary and grant him a majority interest in the stock of Subsidiary.

c. On or about December 12, 1978 Defendant Orange stated to Plaintiff Jim D. Parsons that, if Orange's plan to offer the creditors preferred stock did not succeed, he would seek additional loans from First Alabama Bank for Subsidiary.

d. Defendant Bank, through its agents William M. Richardson and Edward Herbert, led Parsons to believe that First Alabama Bank would provide for the continuing financial needs of Industries.

The representations set out above were made by Defendants as a part of the conspiracy to defraud Plaintiffs were false and were made without the intention of performing them at that time and specifically to induce action by these Plaintiffs.

These Plaintiffs, relying on the representations made by Defendants as set out above, acted to their detriment and were damaged as a result.

7. As a result of the wrongs by Defendants as specified herein and in their complaint, as amended, these Plaintiffs claim damages as follows:

a. Parsons Steel Inc. lost real estate with an appraised market value of $1,000,00.00; damage to its business reputation; lost business and sales; lost profits; bad debts; and punitive damages;

b. Plaintiff Jim D. Parsons: loss of job as President of Industries and resulting salary loss; damage to business reputation; mental anguish; and punitive damages;

c. Plaintiff Melba L. Parsons: mental anguish and punitive damages.

Respectfully submitted,

BEASLEY AND WILSON

BY: Frank M. Wilson
Attorneys for Plaintiffs
Parsons Steel, Inc., Jim D. Parsons
and Melba L. Parsons

Defendant's Exhibit 11

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

MOTION OF DEFENDANTS FIRST ALABAMA BANK AND EDWARD HERBERT FOR RECONSIDERATION OF THEIR MOTION AND RENEWED MOTION FOR SUMMARY JUDGMENT

Defendants Bank and Herbert have repeatedly urged the Court in motions and renewed motions for summary judgment that federal litigation, culminating in the decision of the Eleventh Circuit Court of Appeals in *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, bars relitigation of the plaintiffs' complaints against Bank and Herbert on principles of *res judicata* and collateral estoppel. For the convenience of the Court, earlier supporting briefs containing, among other things, a paragraph by paragraph comparison of the complaints in the two cases, are attached to this motion.[1]

These earlier motions and briefs demonstrate graphically that the matters now complained of in this Court could have been, but were not, presented to the federal court for determination under a complaint which was in large measure copies word for word from the complaint in this action even down to the relief sought.

Moreover, Bank and Herbert have pointed out the inconsistency of the position of the plaintiffs that Bank's counterclaim is barred by *res judicata* and collateral estoppel because of the identical federal litigation; but that their claims are not so barred.

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[1] Because all counsel have copies of the earlier briefs which are also on file, they will not be attached to service copies.

Bank and Herbert do not take such an inconsistent position. We urge the Court — as we have repeatedly — to hold that *both* the plaintiffs' claims in their complaint and defendants' claims in their counterclaims are barred by these principles; and that the Court enter summary judgment for Bank and Herbert *and* for the plaintiffs on these principles, thus barring relitigation of *all* matters which could have been, but were not, litigated in the earlier federal action. In this posture, if any party seeks appellate review, the matters can be presented to the Supreme Court of Alabama on a vastly simplified record, and without a long, costly and perhaps unnecessary trial here. Thus the very purpose of the doctrines of *res judicata* and collateral estoppel will have been served, namely, that parties, courts and the judicial system should not have to undergo the unfair and unnecessary burden and expense of relitigating over and over again matters which could have been disposed of in one case.

Band and Herbert respectfully and earnestly join the plaintiffs in requesting the reconsideration of all of these matters.

Respectfully submitted,

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Attorneys for Defendants

Defendant's Exhibit 12

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

LIST OF DOCUMENTS

The following is a list of documents which defendants First Alabama Bank of Montgomery, N.A. and Edward Herbert anticipate using at the trial of this action. The following are defined terms used herein: defendant, First Alabama Bank of Montgomery, N.A.—"Bank"; Parsons Steel Industries, Inc.—"Subsidiary"; Parsons Steel, Inc.—"Parent"; Standard Machinery Corporation—"SMC"; Standard Building Systems, Inc.—"SBS"; and Orange Steel Industries, Inc.—"OSI". These documents, exhibits, photographs and any demonstrative evidence is available for inspection at the office of Steiner, Crum & Baker, 8th Floor First Alabama Bank Building, Montgomery, AL.

1. Subsidiary notes to Bank:

   a. Note of 6/7/77 for $500,000
   b. Note of 7/31/78 for $239,399
   c. Note of 10/26/78 for $555,000
   d. Security Agreement of 6/7/77.

2. Continuing guaranties of SMC, Parent and Subsidiary to Bank for repayment of Subsidiary debts.

3. Letter of Samuel Kaufman to creditors of Subsidiary, dated December 21, 1978, with attachments.

4. Letter of Ed Herbert to Jim Parsons of January 8, 1979.

5. Letter of Ed Herbert to Jim Parsons of January 15, 1979 giving notice of sale of collateral, along with acknowledgement of receipt of notice and waiver of 5 days notice signed by Jim Parsons.

6. Letter of Edward Herbert to James D. Parsons of January 15, 1979 giving notification of sale of assets on January 17, 1979, with initialed time change and signature of Jim D. Parsons showing notification received.

7. Bill of Sale from Bank to OSI, Inc. of January 17, 1979.

8. Financial statements of Jim Parsons dated August 25, 1975, January 23, 1976, and April, 1978 (attached to counterclaim as Exhibits I, J and K).

9. Note of January 12, 1979 from OSI, Inc. to Bank.

10. Bank's credit file on Subsidiary.

11. Check from Subsidiary to Coggin Agency dated March 6, 1979, written on Exchange Bank Account 01-026-228.

12. State of Alabama individual income tax return, 1978, for Jim D. Parsons and Melba Parsons.

13. U.S. individual income tax return, 1978, for Jim D. Parsons and Melba L. Parsons.

14. Sale of stock agreement made between E.W. Hodge, Mary Jo Hodge and Parent dated 1/26/76.

15. Handwritten statement of Jim Parsons, containing 16 numbered paragraphs, concerning circumstances of Subsidiary financial condition.

16. Option agreement of December 14, 1978.

17. Letter of Michael Orange to Jim Parsons of December 20, 1978 concerning exercise of option agreement.

18. Letter of December 20, 1978 from Luther Waller to Michael Orange concerning exercise of option agreement.

19. Letter of 1/11/79 from Orange to Parsons rescinding option agreement.

20. Subsidiary purchase, sales and receipts register 1978.

21. Subsidiary purchase, sales and receipts register 1978.

22. Parent general ledgers 1977-78, 1978-79, 1979-80, 1980-81, and 1981-82.

23. Parent general journal 1976-77, 1977-78, 1978-79, 1979-80, 1980-81, 1981-82.

24. Parent sales journal 1977-78, 1978-79, 1979-80, 1980-81, and 1981-82.

25. Subsidiary balance sheets

10/31/76	4/30/78
7/31/77	6/30/78
9/30/77	8/31/78
12/31/77	9/30/78
2/28/78	11/30/78
3/31/78	11/30/78
3/31/78 (comparative)	12/31/78

26. Subsidiary accounts payable and receivable schedules for 1978.

27. Subsidiary financial statements

6/23/76
2/24/77
2/24/77
12/31/77
6/30/78

28. Subsidiary adjusting entries 6/31/78 — 12/31/78.

29. Excerpts from payroll register of Subsidiary for 1978, particularly those relating to Melba Parsons, Jim Parsons, Charles Burgess and John Mason. Subsidiary checks to Melba Parsons, 1978.

30. Documents reflecting payment of funds of Subsidiary to E.W. Hodge during 1978 of $100,000, in satisfaction of Parent's obligations under agreement (Item 14).

31. Documents evidencing sales of scrap materials from Subsidiary to Montgomery Iron and Metal Company, Inc. (MIMCO) during the year 1978, totaling approximately $18,641.

32. Balance sheets of Parent from 1976 to 1982.

33. Farley Moody letter of November 15, 1978 to Jim Parsons.

34. Excerpt from Audit and Accounting Guide for Construction Contractors.

35. Document captioned "Parsons Steel Industries Budgeted 1978".

36. Bank's loan review of August, 1978.

37. Newspaper and other articles:

(a) News stories of New York Times News Service and Wall Street Journal of May 28, 1980, and Montgomery Advertiser of April 28, 1980 regarding Chrysler loan guarantee.

(b) Wall Street Journal article of January 9, 1981 regarding Braniff.

38. Certificate issued by Alabama Department of Revenue, reflecting 1978 tax purchase for 1974 Volkswagen; title transfer on 1978 Ford Bronco and 1978 Plymouth Valore.

39. Automobile schedule and change of car coverage schedules for Subsidiary automobile insurance policy no. 10-0644.

40. Subsidiary fixed asset depreciation schedule, 1978.

41. Letters from Subsidiary to creditors, prior to item 3.

42. Letter of 2/7/79 from Hardegree to Beasley.

44. Inventory of Subsidiary, as amended.

45. Corwin appraisal.

46. Lanny Crane exhibits and analysis:

a. Comments regarding adjustments to 11/30/78 financial statement

b. Parent gross sales 10/31/74 - 1981

c. Parent net profit 10/31/74 - 1981

d. Subsidiary comparative financial statement 6/30 & 11/30/78 (balance sheet)

e. Subsidiary comparative financial statement 6/30 & 11/30/78 (income statement)

f. List of questionable payments by Subsidiary

g. Chart of ownership of Subsidiary & Parent

h. Subsidiary:

Accounts payable - 11/30/78
Accounts payable - 10/30/78
Accounts payable - 9/30/78
Accounts payable - 8/30/78

47. Trustee's complaint in bankruptcy Case No. 79-173-N

48. Defendants' interrogatories to plaintiff in bankruptcy case No. 79-173-N.

49. Plaintiff's answers to defendants' interrogatories in bankruptcy case No. 79-173-N.

50. Plaintiff's supplemental answers to defendants' interrogatories in bankruptcy case No. 79-173-N.

51. Comparison of pleadings filed by Trustee for Parsons Steel Montgomery.

52. Transcript of plaintiff's attorney's opening statement in federal case.

53. Comparison of witness lists in federal and state cases.

54. Comparison of paragraphs of complaints in state and federal actions.

55. Complaint in federal action (No. 79-249-N).

56. Amendment to complaint in federal action dated 8/3/79.

57. Transcript of all proceedings in federal action.

58. All depositions taken in both this action and the federal action.

59. Photographs of plant site.

60. Merchants National Bank credit file excerpts on Parent.

dated: 10/19/78.

dated: 10/31/80.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 13

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

ALTERNATIVE MOTION TO RECONSIDER OR FOR CONTINUANCE

Defendants First Alabama Bank of Montgomery, N.A. and Edward Herbert move that the Court reconsider its order of January 24, 1983, denying these defendants' motion for summary judgment based on *res judicata;* or in the alternative, to continue the trial of this case, which is set to begin on January 31, 1983, and as grounds for the above, defendants state the following:

1. At approximately 10:15 A.M. today these defendants first learned that plaintiffs were dismissing their action against defendants OSI and Michael Orange, having apparently reached a settlement.

2. One of the primary reasons asserted by plaintiffs to avoid the bar of *res judicata* was the alleged lack of identity of parties in the federal action. Now that the defendants who were not parties to the federal action — Orange and OSI — are no longer parties, the parties are certainly identical and *res judicata* clearly applies to bar this action. Accordingly, these defendants respectfully request this Court to grant their motion for summary judgment. If this motion is granted, any party who wishes to test the *res judicata* defense on appeal may do so without the expense and time required for a trial on the merits. Alternatively, if this Court finds that the *res judicata* defense involves a controlling question of law, this Court may certify an appeal pursuant to Rule 5, A.R.A.P.

3. Crucial witnesses for these defendants' case are Michael Orange, Jessie M. Williams, III, and Henry Hardegree. Since these witnesses were parties and attorneys for parties prior to the events described in paragraph 1, they were not subpoenaed by these defendants because of an agreement with the attorney for Orange and OSI that they would be present and available at trial.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 14

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

CROSSCLAIM OF DEFENDANTS BAND AND HERBERT AGAINST OSI, INC. AND MICHAEL ORANGE

Pursuant to Rule 13(g), A.R.C.P., defendants First Alabama Bank of Montgomery ("Bank") and Herbert file this crossclaim against defendants OSI, Inc. and Michael Orange and say as follows:

Bank and Herbert include by reference all complaints and amendments thereto on file in this action; and further say that defendants OSI, Inc. and Orange are liable to Bank and Herbert, as crossclaimants hereunder, for all or part of the claims asserted in this action by plaintiffs against Bank and Herbert.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 15

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS BANK AND HERBERT

Defendants First Alabama Bank of Montgomery ("Bank") and Herbert move for summary judgment in their favor as to all claims of all plaintiffs made against them in this action, and in support of this motion show the Court that there is no genuine issue as to any material fact relating to the following circumstance, and this circumstance moreover entitles defendants Bank and Herbert to judgmnet of dismissal in their favor:

As affirmatively appears from the stipulation on file by and between plaintiffs and defendants other than Bank and Herbert, said stipulation and proceedings in this Court taken pursuant to it have the effect as a matter of law of barring this action by these plaintiffs against Bank and Herbert, and require a discharge and dismissal of those said claims. *Butler v. GAB Business Services, Inc.*, 416 So.2d 984 (Ala. 1982); *Steenhus v. Holland*, 217 Ala. 105, 115 So.2d 2.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 17

IN THE CIRCUIT COURT OF MONTGOMERY
COUNTY, ALABAMA
No. CV-79-179-G
[Caption Omitted]

SECOND AMENDMENT TO ANSWER OF DEFENDANT FIRST ALABAMA BANK OF MONTGOMERY, N.A.

Defendant, First Alabama Bank of Montgomery, N.A., further amend its answer by adding thereto the following:

Twentieth Defense

This action by Plaintiffs against this Defendant is fully barred by virtue of a settlement between the Plaintiffs and Defendants other than Defendants Bank and Herbert.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 18

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

SECOND AMENDMENT TO ANSWER OF DEFENDANT EDWARD HERBERT

Defendant, Edward Herbert, further amends his answer by adding thereto the following:

Twentieth Defense

This action by Plaintiffs against this Defendant is fully barred by virtue of a settlement between the Plaintiffs and Defendants other than Defendants Bank and Herbert.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: James A. Byram, Jr.

Defendant's Exhibit 19

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

No. CV-79-179-G

[Caption Omitted]

ANSWER OF FIRST ALABAMA BANK OF MONTGOMERY, N.A.

Comes now defendant First Alabama Bank of Montgomery, N.A. ("Bank"), and in answer to the complaint, as amended, states the following:

I.

First Defense

Plaintiffs Parsons Steel, Inc. ("Parent"), Jim D. Parsons ("Parsons") and Melba L. Parsons have no standing to bring this action and are improper parties to it.

II.

Second Defense

This action is barred in its entirety by principles of res judicata and collateral estoppel.

III.

Third Defense

There is no jurisdiction of the subject matter insofar as the actions of these plaintiffs are concerned in that neither officers, stockholders, nor controlling stockholders, nor a sole stockholder can maintain an action to recover for an injury to the corporation in which the stock is held, even though the value of the stock may be impaired as a result of the injury, and even though the acts complained of may have resulted in damage both to the corporation and the stockholder.

IV.

Fourth Defense

The Complaint, as amended, and each count thereof fails to state a claim upon which relief can be granted.

V.

Fifth Defense

The complaint, as amended, and each count thereof fails to state a claim against this defendant upon which relief can be granted.

VI.

Sixth Defense

With respect to Count One of the complaint, as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraphs 9, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, and 38, and specifically denies that plaintiffs are entitled to any relief under this count.

B. Defendant admits the allegations of paragraphs 5, 6, and 25.

C. Defendant is without sufficient knowledge or information to admit or deny the averments of paragraphs 2, 7 and 8.

D. With respect to paragraph 1, defendant is without sufficient knowledge or information to admit or deny that Parsons Steel Industries, Inc. ("Subsidiary") was organized under the laws of the State of Alabama. Defendant specifically denies that after its bankruptcy, Subsidiary had a principal place of business in Montgomery County, Alabama, and avers that Subsidiary has been declared a bankrupt corporation under the Federal Bankruptcy Laws, and its assets are in the possession of its trustee, Pope Gordon.

E. With respect to paragraph 3, defendant is without sufficient knowledge or information to admit or deny the averment that Parsons is a resident citizen of Montgomery County, Alabama. Defendant specifically denies that Parsons was forced to resign as President of Subsidiary; defendant admits that Parsons owned less than five percent of the capital stock of Parsons Steel, but avers that at all material times Parsons misrepresented the extent of his ownership to defendant.

F. With respect to paragraph 4, defendant is without sufficient knowledge or information to admit or deny that Melba Parsons is a resident citizen of Montgomery County, Alabama; defendant admits that at all relevant times Melba Parsons has owned over ninety-five percent of the capital stock of Parsons Steel.

G. With respect to paragraph 10, defendant specifically denies that Subsidiary was a going solvent industrial concern at times relevant to this lawsuit. Defendant is without sufficient knowledge or information to admit or deny the gross sales of Subsidiary.

H. With respect to paragraph 11, defendant is without sufficient knowledge or information to admit or deny the allegations of the first and third sentences of paragraph 11. Defendant admits that Parent owns the common stock of Subsidiary, but specifically denies each and every other aliegation of sentence two.

I. With respect to paragraph 12, defendant admits the allegations of the first sentence and that portion of the second sentence which avers that Subsidiary executed certain Security Agreements to Bank. Each and every other allegation of paragraph 12 is denied.

J. With respect to paragraphs 18 and 19, defendant admits that a letter was sent by attorney Kaufman on behalf of Subsidiary proposing a composition of its creditors, on December

21, 1978. The terms of that letter speak for themselves, and the letter is attached hereto as Exhibit A. Each and every other allegation of paragraphs 18 and 19 is denied.

K. With respect to paragraph 34, defendant admits that the three notes owed by Subsidiary to Bank in November, 1978 were guaranteed as shown in the notes which are attached hereto as Exhibit B, C & D and by the continuing guaranty of Parent up to the amount of $200,000; each and every other allegation of paragraph 34 is denied.

VII.

Seventh Defense

A. With respect to paragraph 1, defendant adopts its answers to paragraph 1 through 38 of Count One of the complaint as amended, as if fully set out herein.

B. Defendant denies each and every allegation of paragraphs 2, 3, and 4 of Count Two and specifically denies that plaintiffs are entitled to any relief under said count.

VIII.

Eighth Defense

With respect to Count Three of the complaint, as amended, defendant answers as follows:

A. With respect to paragraph 1, defendant adopts its answers to paragraphs 1 through 33 of Count Three of the complaint as amended, as if fully set out herein.

B. Defendant denies each and every allegation of paragraphs 2 and 3 of Count Three and specifically denies that defendants are required to account to plaintiffs in any manner.

IX.

Ninth Defense

With respect to Count Four of the complaint, as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraph 1, defendant further denies that plaintiffs are entitled to any relief under said Count Four of the complaint as amended.

X.

Tenth Defense

With respect to Count Five of the complaint as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraphs 1 and 2 of said Count Five and denies that plaintiffs are entitled to any relief thereunder.

XI.

Eleventh Defense

With respect to Count Six of the complaint, as amended, defendant answers as follows:

A. Defendant denies each and every allegation of paragraph 1 of said Count Six and denies that plaintiffs are entitled to any relief thereunder.

XII.

Twelfth Defense

With respect to Count Eight of the complaint, as amended, defendant answers as follows:

A. With respect to paragraph 1, defendant adopts its answers to paragraphs 1 through 37 of Count One of the complaint as amended, as if fully set out herein.

B. Defendant Denies each and every allegation of paragraphs 2, 3, and 4 of Count Eight and denies that plaintiffs are entitled to any relief thereunder.

COUNTERCLAIM OF DEFENDANT BANK

Comes now defendant and files and asserts the following counterclaim against plaintiffs. Defendant files this counterclaim without waiving any of the separate and several defenses heretofore asserted, including, without limitation, the defense that this Court has no jurisdiction of the subject matter of the action brought by plaintiffs, and that plaintiffs are without standing to assert this action.

First Counterclaim

1. Subsidiary executed the following three notes in favor of Bank: Note of June 7, 1977 in the amount of $500,000; Note of July 31, 1978 in the amount of $239,399; and Note of October 26, 1978 in the amount of $550,000 ("The Notes"). (Attached hereto as Exhibits B, C and D respectively) The note of June 7, 1977 was personally guaranteed by plaintiffs Parsons and Melba Parsons, and the notes of July 31 and October 26, 1978 were personally guaranteed by Parsons. All of Subsidiary's obligations with the Bank were guaranteed by Parent up to an amount of $200,000.

2. As of January 8, 1979 the amount past due and unpaid on The Notes was approximately $1,000,000. In order to recover the sum of money to which it was entitled, it was necessary for defendant to foreclose on the collateral which secured The Notes; and it did so on January 15, 1979 and sold the collateral in satisfaction of the amount due and unpaid on The Notes, with the exception of attorneys fees, on January 17, 1979.

3. The Notes each contain the following provision:

> "In the event of default by Debtor....the proceeds of default sale realized from disposition of collateral may be applied to...Secured Party's reasonable attorney's fees of 15% of the unpaid debt, where the original principal amount or the original amount financed exceeds $300, the legal expenses associated with such sale, or any suit arising

therefrom, or any suit brought to secure recovery of the collateral. . . . Debtor shall be liable to Secured Party for any deficiency that may arise from sale or disposition of collateral."

4. Plaintiffs have brought two lawsuits which arise out of the circumstances of foreclosure specified in paragraph 2 of this Counterclaim—this action and an action brought in the United States District Court for the Middle District of Alabama Northern Division, styled "Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A., Civil Action No. 79-249-N" ("Federal Action"). Both actions seek to undo and nullify the payment to defendant of the sums due and unpaid on The Notes in the circumstances described in paragraph 2 of this Counterclaim and are suits arising from the sale of collateral securing the Notes within the meaning of said Notes.

5. Any recovery by plaintiffs or Subsidiary in either action specified in paragraph 4 of this Counterclaim would create a deficiency which would be due and payable to defendant on The Notes; and this Counterclaim asserts a right of recovery against plaintiffs in an amount of any such deficiency.

6. This Counterclaim seeks as well attorneys fees in connection with the default in payment of The Notes—legal expenses incurred because it was necessary for Bank to defend against this action and the federal action in order to collect on the Notes, and which are stipulated in The Notes to be "reasonable" legal expenses associated with the sale of collateral, "or any suit arising therefrom, or any suit brought to secure recovery of the collateral"—in an amount not less than $150,000, and other legal costs and expenses.

WHEREFORE, defendant demands judgment against plaintiffs for deficiency in the amount of its recovery on The Notes arising out of the circumstances specified in paragraph 4 hereinabove; judgment for its attorneys fees and legal costs and expenses arising out of or related to this action, the Federal Ac-

tion, or the foreclosure and sale of the collateral specified hereinabove; and related costs and interest in an amount not less than $150,000 plus costs and interest; and defendant demands such other, further or additional sum, judgment or relief to which it may be entitled.

Second Counterclaim

1. In connection with and for the purpose influencing action in the form of obtaining a loan or loans from defendant (a national banking association the deposits of which at all relevant times were and are insured by the Federal Deposit Insurance Corporation) for himself and for Subsidiary, Parsons, acting on behalf of himself and the other plaintiffs, knowingly made the following false statements or reports, or willfully overvalued land, property or security, or both:

(a) Statements or reports attached hereto as Exhibits E, F, and G recite that Parsons owned nonmarketable securities in the form of 99 shares of Parent of the stated valuation of $163,000, $160,000 and $913,000 respectively, whereas, as shown in his deposition testimony of February 18, 1980 (attached hereto as Exhibit H) Parsons knew these statements to be false, and willfully made such statements regarding this stock ownership. In fact, at the time such false statements were knowingly made, Parsons owned only 1 share of such stock as is admitted in the complaint in this action.

(b) On December 14, 1978 Parsons executed an option agreement with Michael Orange (attached hereto as Exhibit I) in which Parsons knowingly made the false statement or report that he was the owner of 98% of the stock of Parent, whereas, as shown in his said deposition testimony (Exhibit H), Parsons knew this statement to be false and willfully made such false statement regarding this stock ownership. In fact, at the time such false statement was knowingly made, Parsons owned only 1% of such stock.

(c) Parsons willfully made the false statements or reports or willfully overvalued the land, property or security contained in the financial statements attached hereto as Exhibits K and L.

2. At all times material to this Counterclaim, Parsons' said actions or omissions including, without limitation, knowingly false statements or willful overvaluation of land, property or security for the purposes of influencing actions in the form of loans from defendant to Subsidiary, were made and taken on his own behalf as well as on behalf of Subsidiary and the other plaintiffs.

3. Each of these wrongful acts or omissions specified in this Counterclaim constituted knowing or willful violations of 18 U.S.C.A. § 1014, a federal criminal statute. As such this misconduct, proscribed by this federal criminal statute, constitutes actionable common law fraud which entitled defendant to recovery for injury and damages proximately caused by such fraud, and to punitive damages as well. Included, without limitation, among the injuries and damages proximately caused by such fraudulent misconduct on the part of plaintiffs are all financial losses on loans to Subsidiary and Parsons; the costs of defense of this action and the federal action, and the amount of any damages assessed and the financial impact of any relief obtained in these two actions; and all of the damages sought in the First Counterclaim.

WHEREFORE, defendant demands judgment against all plaintiffs for compensatory damages as aforesaid, together with interest and costs of this action, and punitive damages. Defendant also demands such other, further or additional sums, judgment or relief to which it may be entitled.

STEINER, CRUM & BAKER

BY: M. R. Nachman, Jr.

BY: Eric G. Bruggink

Attorneys for Defendant First
Alabama Bank of Montgomery N.A.

Defendant's Exhibit 20

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT
FOR ALABAMA
No. CV-79-179-T
[Caption Omitted]

ORDER

This matter comes before this Court for hearing on Renewed Motion for Summary Judgment of Defendants Bank and Herbert, authorities submitted and after consideration of same, it is

ORDERED, ADJUDGED and DECREED that Defendants Bank and Herbert Renewed Motion for Summary Judgment is hereby DENIED.

DONE this the 31st day of January, 1983.

/s/ Sam W. Taylor - Circuit Judge

Defendant's Exhibit 22

February 9, 1983
Court Met Pursuant to Adjournment
Present the Honorable Sam W. Taylor, Judge Presiding

CV-79-179-T

Parsons Steel Industries, Inc.
Parsons Steel, Inc.
Jim D. Parsons and Melba L. Parsons
and A. Pope Gordon as Trustee for
Parsons Steel Industries, Inc.

vs.

First Alabama Bank of Montgomery,
N. A., Edward Herbert

This day came the parties by their attorneys and issue being joined between the parties, thereupon came a jury of good and lawful persons, to-wit: Sam Barrett and eleven others who having been duly empaneled and sworn according to law upon their oaths do say:

> We, the jury, find for the plaintiff, Jim D. Parsons, and against the defendants and assess the plaintiff's damages at One Million Dollars ($1,000,000.00).
>
> /s/ Sam B. Barrett, Foreman

> We, the jury, find for the plaintiff, Melba L. Parsons, against the defendants and assess the plaintiff's damages at One Million Dollars ($1,000,000.00).

> We, the jury, find for the plaintiff, A. Pope Gordon as trustee for Parsons Steel Industries, Inc. and against the defendants and assess the plaintiff's damages at Two Million Dollars ($2,000,000.00).

> We, the jury, find for the plaintiff, Parsons Steel, Inc. and against the defendants and assess the plaintiff's damages at One Dollar ($1.00).

It is further Considered, Ordered and Adjudged by the Court that judgment be and the same is hereby rendered in favor of the plaintiff, Jim D. Parsons, for $1,000,000.00 dollars; plaintiff, Melba L. Parsons, for $1,000,000.00 dollars; plaintiff, A. Pope Gordon as Trustee for Parsons Steel Industries, Inc., for $2,000,000.00 dollars and for plaintiff, Parsons Steel, Inc., for $1.00 dollar, and that the said plaintiffs have and recover of the defendants, First Alabama Bank of Montgomery, N. A., and Edward Herbert, the said sum of $4,000,001.00, together with the costs in this behalf expended, for all of which let execution issue.